FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS

JANUARY 1, 1984 TO JUNE 30, 1984

PUBLISHED BY THE COMMISSION

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JANUARY 1, 1984 TO JUNE 30, 1984

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Took oath of office November 18, 1983

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Appointed April 17, 1983

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

AMERICAN EXPRESS COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-3129. Complaint, Jan. 9, 1984—Decision, Jan. 9, 1984

This order requires a New York City credit card company, among other things, to cease failing to prevent computerized collection letters from being sent to cardholders who have written the company of a billing error and who are withholding payment pending resolution of the dispute. Respondent must forfeit the amount in dispute, up to $50, should it fail to comply with the Fair Credit Billing Act's billing error resolution procedures and maintain for at least two years, records evidencing compliance with the Act's provisions. Further, respondent must resolve billing errors involving foreign merchants within the lesser of 90 days or 2 complete billing cycles from the date of receiving a billing error notice.

Appearances

For the Commission: *Ronald G. Issac, Jonathan D. Jerison* and *Arthur B. Patrizio.*

For the respondent: *Ronald J. Greene, Christopher R. Lipsett* and *Clifford B. Hendler, Wilmer, Cutler & Pickering,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that American Express Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

For the purposes of this complaint, the terms *billing error, card-*

holder, card issuer, credit card, and *proper written notification of a billing error* shall be defined as these terms are defined in Regulation Z (12 CFR 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601 *et seq.*), duly promulgated by the Board of Governors of the Federal Reserve System.[1]

PARAGRAPH 1. Respondent American Express Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at American Express Plaza, New York, New York.

PAR. 2. For some time in the past before January 1, 1983, respondent had been engaged in the issuing of American Express Cards which could be used to charge the costs of travel and entertainment services and merchandise purchased from stores and other establishments that honor such Cards. Since January 1, 1983, such Cards have been issued by a wholly-owned subsidiary of respondent.

PAR. 3. In the ordinary course of its business as aforesaid, respondent was a "card issuer." Thus, pursuant to Section 226.2(s) of Regulation Z, respondent was a "creditor" for purposes of Section 226.14 of Regulation Z.

PAR. 4. In some instances, respondent's collection procedures provided for computer-generated collection letters to be sent automatically to cardholders whose accounts were delinquent. Upon receipt of proper written notification of a billing error from a cardholder who had withheld payment of a disputed amount, respondent instructed its computers to cease all collection activity for a specified period of time. In some instances, billing errors were not resolved within this specified period and respondent's employees failed to prevent the computer from resuming automated collection activity with respect to disputed amounts. As a result, in some instances respondent mailed or delivered or caused to be mailed or delivered to cardholders collection letters demanding payment of amounts alleged to be in error prior to resolving the dispute as required by Section 226.14(a)(2) of Regulation Z.

PAR. 5. In some instances, after receiving proper written notification of a billing error concerning a transaction outside the United States between a cardholder and a foreign business entity that honors respondent's Card, respondent failed to resolve the billing error within the lesser of ninety (90) days or two (2) complete billing cycles from the date of receipt of proper written notification of a billing error, as required by Section 226.14(a)(2) of Regulation Z.

PAR. 6. By and through the acts and practices alleged in Paragraphs

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[1] All reference to the Truth in Lending Act and Regulation Z contained in this complaint shall refer to the Truth in Lending Act as amended to March 23, 1976 and Regulation Z as amended to March 23, 1977.

Four and Five, respondent forfeited the right to collect from the cardholder the amount indicated by the cardholder to be a billing error (whether or not such amount was in fact in error) and any finance charges, late payment charges, or other charges imposed thereon up to a maximum of $50 for each item or transaction indicated by the cardholder to be a billing error. In some of these instances, respondent failed to forfeit amounts that it should have legally forfeited, in violation of Section 226.14(f) of Regulation Z.

PAR. 7. In the ordinary course and conduct of its business, respondent retained certain correspondence and computerized, microfilmed, and other records relating to its handling of billing errors. In some instances before August 1981, respondent did not retain adequate evidence of compliance with Section 226.14 of Regulation Z for a period of two (2) years, as required by Section 226.6(i) of Regulation Z.

PAR. 8. Pursuant to Section 103(s) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constituted violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Express Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at American Express Plaza, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For purposes of this Order, the terms *billing error, billing-error notice, cardholder, consumer credit, credit card,* and *state* shall be defined as these terms are defined in Regulation Z (12 CFR 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601 *et seq.*).[1]

It is ordered, That respondent American Express Company, a corporation, its successors and assigns in any state, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in any state, in connection with any consumer credit transaction involving the use of any credit card issued by respondent to a resident of any state, do forthwith cease and desist from:

1. Failing, following respondent's receipt of a billing-error notice from a cardholder who has withheld payment of a disputed amount, to prevent respondent's computerized collection procedures from causing collection letters to be mailed to the cardholder to collect any portion of an amount indicated in the cardholder's notice as being a billing error (or any finance charge, late payment charge, or other charge computed on such disputed amount) prior to resolving the dispute, as required by Section 226.13(d)(1) of Regulation Z.

2. Failing, following respondent's receipt of a billing-error notice from a cardholder concerning a transaction outside the United States between the cardholder and a foreign business entity that honors any credit card issued by respondent, to resolve the billing error within

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[1] All reference to the Truth in Lending Act and Regulation Z contained in this Order shall refer to the Truth in Lending Act as amended to March 31, 1980 and Regulation Z as amended to April 1, 1981.

the lesser of ninety (90) days or two (2) complete billing cycles from the date of receipt of the billing-error notice, as required by Section 226.13(c)(2) of Regulation Z.

3. Failing to establish procedures which will require that, if correspondence is received from cardholders alleging, or reciting facts which on their face show, noncompliance with Sections 226.13(c) or (d)(1) of Regulation Z, such correspondence will be forwarded to personnel with authority to take appropriate action to comply with the forfeiture provision of Section 161(e) of the Truth in Lending Act.

4. Failing to keep evidence of compliance with Section 226.13 of Regulation Z for a period of two (2) years, as required by Section 226.25(a) of Regulation Z.

Provided, That respondent shall not be liable for a civil penalty for any violation of this Order if it shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error or mistake notwithstanding the maintenance of procedures reasonably adapted to avoid any such error or mistake.

It is further ordered, That respondent distribute a copy of this Order to each of respondent's present and future supervisory personnel who are responsible for operations relating to resolution of credit card billing errors, and that respondent secure a signed statement acknowledging receipt of a copy of this Order from each such person.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other changes in the corporation that may affect compliance obligations rising out of this Order.

It is further ordered, That respondent herein shall, within ninety (90) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

Docket 8918. Interlocutory Order, Jan. 12, 1984

ORDER DENYING PETITION TO REOPEN AND ORDER TO SHOW CAUSE

On September 9, 1981, the Commission issued an opinion and order to cease and desist against American Home Products Corporation ("AHP") and the C.T. Clyne Co., Inc., corporate successor to AHP's advertising agency. In its opinion, the Commission held that AHP had engaged in various deceptive practices in violation of Section 5 of the FTC Act in connection with advertising for the aspirin-based pain relievers Anacin and Arthritis Pain Formula. The Commission's order contained provisions designed to secure cessation of these violations and prevent related ones. 98 F.T.C. 362.

AHP sought review of portions of the Commission's order in the United States Court of Appeals for the Third Circuit. On December 3, 1982, the court of appeals affirmed the Commission's order in all respects, save for paragraph II(D), which it ordered deleted. On December 28, 1982, the court denied AHP's petition for rehearing and suggestion of rehearing *en banc*.

On April 8, 1983, no petition for certiorari having been filed by AHP, the Commission entered its modified order to cease and desist, pursuant to the mandate of the Third Circuit. The modified order was identical to the order of September 9, 1981, save for court-ordered deletion of paragraph II(D). By separate order of April 8, 1982, the Commission stayed its modified order as to AHP until the later of September 30, 1983, or 90 days following disposition of a petition to reopen filed no later than April 15, 1983.[1]

On April 15, 1983, AHP filed a petition to reopen the modified order of April 8, 1983, asking that it be stayed until the orders in *Bristol-Myers Company*, Docket No. 8917 [102 F.T.C. 21 (1983)], and *Sterling Drug Inc.*, Docket No. 8919 [102 F.T.C. 395 (1983)], became final. In the alternative, AHP requested that paragraph I(B) of the order, the so-called "substantial question" provision, be stayed pending the outcome of the *Bristol* and *Sterling* cases, and that paragraph III, requiring disclosure that Anacin and Arthritis Pain Formula contain aspirin in advertisements that make performance claims for the products, be modified to require disclosure of aspirin content for a limited period of time in a specified percentage of all advertisements for Anacin and APF, and thereafter only in a smaller class of advertisements than required by the Commission's order.

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[1] The Commission's stay was issued in response to AHP's letter request of March 15, 1982. In a letter of March 18, 1982 responding to that request, the Commission advised AHP that upon expiration of the time for Supreme Court review of the order, and in the event that no review had been sought, the Commission would enter a stay on the terms of that ultimately entered.

By letter of August 1, 1983, AHP waived any claim that its petition for reopening be decided within the 120 day period specified by Section 5(b) of the FTC Act, 15 U.S.C. 45(b). By memorandum of October 3, 1983, AHP purported to withdraw that part of its petition for reconsideration that agreed to reformulation of an order, and instead requested only that the Commission stay the effect of the entire order against it until judicial review of the orders against Bristol-Myers Corp. and Sterling Drug, issued on July 5, 1983, was complete and the orders have become final. By memorandum of November 23, 1983, Commission staff replied to AHP's petition for reopening, recommending that it be denied, except that paragraph I(B) be modified to grant AHP the option of making comparative efficacy claims where it possessed a "reasonable basis" therefor. On December 12, 1983, AHP filed a reply reiterating its position that the order against it should be stayed.

It thus appears that the Commission now has before it a petition for reopening by American Home Products, which consists only of a request that the order, in its entirety, be stayed for the indefinite duration of the Bristol and Sterling appeals. That petition for reopening is hereby denied, and unless further modified, the Commission's final order of April 8 will, therefore, take effect 90 days from the date of this order. We will maintain our stay of paragraph I(B) of the order, however, pending resolution of the show cause proceeding initiated by this order.

There is absolutely no basis for a stay of the Commission's entire order, as AHP now seeks. The Commission found that AHP had engaged in numerous serious violations of law, involving deceptive advertising. As to some of these findings of violation and related order provisions, AHP did not even seek judicial review. As to those findings of violation of which AHP did seek review, *all* were judicially affirmed, although one order provision was deleted. There is no provision of equity or law which requires that a party found to have engaged in deceptive practices be left free of restraint to repeat them until such time as judicial proceedings against competitors are completed. To the contrary, the case law makes plain the Commission's authority to exercise prosecutorial discretion in the choice of its targets and the order in which it pursues and places them under order. *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Indus., Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *Encyclopedia Britannica* v. *FTC*, 605 F.2d 964, 974 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); *Johnson Prods. Co.* v. *FTC*, 549 F.2d 35, 41 (7th Cir. 1977).

The Third Circuit in affirming the Commission's order in this case, observed that

> There is no contention that the Commission abused its discretion by refusing, in its denial of AHP's petition for rehearing, to stay its Order until proceedings against AHP's competitors, Sterling Drug and Bristol-Myers, have been completed.

695 F.2d at 714. The court did indicate that "it would not seem unreasonable that in the interest of fairness a stay be granted at least with respect to part I(B) of the order," *Id.*,[2] but it also cited with approval the case law holding that simultaneity of prosecution and order finality is not required, and observed that "we do not suggest that the Commission should ignore the interests of scrupulous competitors who forego misleading claims," *Id.* at n.51, to which might also be added, the interests of consumers subjected to those claims.

AHP appears to believe that a stay should be granted because the Second and Ninth Circuits, in which Bristol and Sterling respectively have sought review of their orders, might modify them in some unspecified respect, thus entitling AHP to return and seek the same modifications in its order.

Even assuming, *arguendo,* that decisions by the Second or Ninth Circuits as to *Bristol* and *Sterling* would be grounds for reopening a final order as to AHP that has been affirmed and enforced by the Third Circuit, AHP's position is overbroad, for the petitions in both *Bristol* and *Sterling* focus on limited portions of those orders, and raise not even a theoretical possibility of undermining the underpinnings of portions of the AHP order. Moreover, factual differences between the cases cast doubt on the relevance of the *Sterling* and *Bristol* decisions to AHP's. In any event, compliance with the judicially affirmed, final order entered against it would in no way prevent AHP from seeking modification of that order at some later time should it believe circumstances warrant. *See* 15 U.S.C. 45(b). That highly speculative possibility, however, is hardly grounds for AHP to escape in the interim the force of an order designed to prevent proven violations of law.

For all these reasons, AHP's suggestion that the entire order against it be held in abeyance is not well taken, and is hereby rejected. In one respect, however, the AHP order is clearly inconsistent with the *Sterling* and *Bristol* orders entered by the Commission. Complaint counsel would remedy this situation by granting AHP the option under paragraph I(B) to make comparative analgesic efficacy claims supported by a reasonable basis as articulated in the *Bristol* and

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[2] The modification proposed by the Commission in the Order to Show Cause, *infra*, would obviate the Third Circuit's concern, by allowing AHP as an alternative method of compliance with paragraph I(B) the same approach as contained in the orders against Bristol and Sterling.

Sterling decisions. Under complaint counsel's proposal, AHP would have the option, when making comparative efficacy claims for analgesics, of complying with the order affirmed by the Third Circuit, or with the reasonable basis provision entered by the Commission in the *Bristol* and *Sterling* orders.

The Commission believes that complaint counsel's proposal has merit, and will order the parties to show cause within 15 days why it should not be adopted. The show cause period will also permit AHP and staff one final opportunity to discuss staff's proposal.

Therefore,

It is ordered, That respondent's petition to reopen of April 15, 1983, as subsequently modified by memorandum of October 3, 1983, be denied. Pursuant to its stay order of April 8, 1983, the Commission's modified order of April 8, 1983 shall take effect 90 days from the date of this order, except for paragraph I(B), which shall remain stayed pending proceedings on the Order to Show Cause.

It is further ordered, That the parties shall, within fifteen days from the date of this order, show cause if any there be, why the Commission's order of April 8, 1983, should not be reopened and modified to the extent of permitting AHP to comply with paragraph I(B) of the order by possessing a reasonable basis for comparative claims of efficacy made for analgesic products.

IN THE MATTER OF

THE MAICO COMPANY

ORDER TO SET ASIDE IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5822. Consent Order, May 22, 1955—Order To Set Aside, Jan. 13, 1984

On Jan. 13, 1984, the Federal Trade Commission set aside the May 22, 1955 order issued against The Maico Co. (51 F.T.C. 1197), in light of its actions in *Beltone Electronics Corp.*, Dkt. 8928 [100 F.T.C. 68 (1982)] and *Dahlberg Electronics Corp.*, Dkt. 8229 [101 F.T.C. 703 (1983)], which set aside prohibitions on the companies' use of exclusive dealing arrangements.

ORDER TO SET ASIDE ORDER TO CEASE AND DESIST

On May 22, 1955, the Federal Trade Commission issued an order against The Maico Company in Docket No. 5822 prohibiting Maico, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements upon its dealers. [51 F.T.C. 1197]

Two of Maico's larger competitors are now permitted by recent Commission actions to engage in the same exclusive dealing practices contained in the order against Maico. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.,* Docket No. 8928 [100 F.T.C. 68], challenging, among other things, the same practices prohibited by the order against Maico. On April 11, 1983, the Commission in *Dahlberg Electronics, Inc.,* Docket No. 8929 [101 F.T.C. 703], set aside prohibitions on Dahlberg's use of exclusive dealing arrangements, which were similar to those contained in the order against Maico.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Maico an order to show cause why the proceeding herein should not be reopened to set aside the final cease and desist order in Docket No. 5822, prohibiting Respondent's use of exclusive dealing arrangements. Respondent was provided an opportunity to object to the proposed set aside of the order against it, and having failed to do so, is now deemed to have consented to such action. In view of the Commission's actions in *Beltone* and *Dahlberg,* the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that the order herein shall be set aside as of the effective date of this order.

IN THE MATTER OF

MAICO HEARING INSTRUMENTS, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8927. Consent Order, Aug. 4, 1976—Modifying Order, Jan. 13, 1984

The Federal Trade Commission has modified the order issued against Maico Hearing Instruments, Inc. on Aug. 4, 1976 (88 F.T.C. 214). The modified order permits the company to suggest resale prices to its dealers and impose standards on the kinds of customers and territories its dealers can serve. The modification leaves intact the prohibition against resale price maintenance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On Aug. 4, 1976, the Federal Trade Commission issued an order against Maico Hearing Instruments, Inc. in Docket No. 8927 prohibiting Maico, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements and customer and territorial restraints upon its dealers. [88 F.T.C. 214]

Two of Maico's larger competitors are now permitted by recent Commission actions to engage in the same non-price vertical restraints contained in the order against Maico. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.,* Docket No. 8928 [100 F.T.C. 68], challenging the same practices prohibited by the order against Maico. On April 11, 1983, the Commission modified the order in *Dahlberg Electronics, Inc.,* Docket No. 8929 [101 F.T.C. 703], which is also similar to the order against Maico, to set aside prohibitions on Dahlberg's use of certain non-price vertical restraints. Further, it modified that order's ban on resale price maintenance to permit Dahlberg to suggest retail prices to its dealers.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Maico an order to show cause why the proceeding herein should not be reopened to set aside provisions of the final cease and desist order in Docket No. 8927, prohibiting Respondent's use of exclusive dealing arrangements and customer and territorial restrictions. Respondent was provided an opportunity to object to the proposed modification of the order against it, but has instead consented to such modification. In view of the Commission's actions in *Beltone* and *Dahlberg,* the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that Paragraphs No. 1, 2, 3, 4, 6, 7, 8 and 9 of Part I shall be set aside as of the effective date of this order.

It is further ordered, That Paragraph No. 5 of Part I be modified as of the effective date of this order by striking "5" and "or suggesting" and inserting "or" after "stabilizing,".

IN THE MATTER OF

SONOTONE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2414. Consent Order, June 19, 1973—Modifying Order, Jan. 13, 1984

The Federal Trade Commission has modified the order issued against Sonotone Corp. on June 19, 1973 (82 F.T.C. 1802). The modified order permits the company to suggest resale prices to its dealers, and impose standards on the kinds of customers and territories its dealers can serve. The modification leaves intact the prohibition against resale price maintenance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On June 19, 1973, the Federal Trade Commission issued an order against Sonotone Corporation in Docket No. C-2414 prohibiting Sonotone, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements and customer and territorial restraints upon its dealers. [82 F.T.C. 1802]

Two of Sonotone's larger competitors are now permitted by recent Commission actions to engage in the same non-price vertical restraints contained in the order against Sonotone. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8928 [100 F.T.C. 68], challenging the same practices prohibited by the order against Sonotone. On April 11, 1983, the Commission modified the order in *Dahlberg Electronics, Inc.*, Docket No. 8929 [101 F.T.C. 703], which is also similar to the order against Sonotone, to set aside prohibitions on Dahlberg's use of certain non-price vertical restraints. Further, it modified that order's ban on resale price maintenance to permit Dahlberg to suggest retail prices to its dealers.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Sonotone an order to show cause why the proceeding herein should not be reopened to set aside provisions of the final cease and desist order in Docket No. C-2414, prohibiting Respondent's use of exclusive dealing arrangements and customer and territorial restrictions. Respondent was provided an opportunity to object to the proposed modification of the order against it, and having failed to do so, is now deemed to have consented to such modification. In view of the Commission's actions in *Beltone* and *Dahlberg*, the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that Paragraphs No. 1, 2, 3, 4, 6, 7, 8 and 9 of Part I shall be set aside as of the effective date of this order.

It is further ordered, That Paragraph No. 5 of Part I be modified as of the effective date of this order by striking "5" and "or suggesting" and inserting "or" after "stabilizing,".

In the Matter of

RADIOEAR CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2419. Consent Order, June 26, 1973—Modifying Order, Jan. 13, 1984

The Federal Trade Commission has modified the order issued against Radioear Corp. on June 26, 1973 (82 F.T.C. 1830). The modified order permits the company to suggest resale prices to its dealers, and impose standards on the kinds of customers and territories its dealers can serve. The modification leaves intact the prohibition against resale price maintenance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On June 26, 1973, the Federal Trade Commission issued an order against Radioear Corporation in Docket No. C-2419 prohibiting Radioear, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements and customer and territorial restraints upon its dealers. [82 F.T.C. 1830]

Two of Radioear's larger competitors are now permitted by recent Commission actions to engage in the same non-price vertical restraints contained in the order against Radioear. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8928 [100 F.T.C. 68], challenging the same practices prohibited by the order against Radioear. On April 11, 1983, the Commission modified the order in *Dahlberg Electronics, Inc.*, Docket No. 8929 [101 F.T.C. 703], which is also similar to the order against Radioear, to set aside prohibitions on Dahlberg's use of certain non-price vertical restraints. Further, it modified that order's ban on resale price maintenance to permit Dahlberg to suggest retail prices to its dealers.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Radioear an order to show cause why the proceeding herein should not be reopened to set aside provisions of the final cease and desist order in Docket No. C-2419, prohibiting Respondent's use of exclusive dealing arrangements and customer and territorial restrictions. Respondent was provided an opportunity to object to the proposed modification of the order against it, and having failed to do so, is now deemed to have consented to such modification. In view of the Commission's actions in *Beltone* and *Dahlberg*, the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that Paragraphs No. 1, 2, 3, 4, 6, 7, 8 and 9 of Part I shall be set aside as of the effective date of this order.

It is further ordered, That Paragraph No. 5 of Part I be modified as of the effective date of this order by striking "5" and "or suggesting" and inserting "or" after "stabilizing,".

IN THE MATTER OF

HUGHES TOOL COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket 9138. Complaint,[*] June 17, 1980—Decision, Jan. 16, 1984

This consent order prohibits respondent from having on its board of directors any person who is a board member of a competing company, whose revenues derived from the relevant product or service exceed 5 million dollars. Respondent must, among other things, institute an annual monitoring program designed to detect unlawful interlocks; permit only those persons who have submitted the information required by Paragraph III(a) of the order to serve as board members; and provide present and future directors and prospective directors, including those of its subsidiaries, with a copy of the order.

Appearances

For the Commission: *Steven E. Weart, Kristin Malmberg* and *Edward C. Johnson.*

For the respondent: *Paul L. Mueller* and *Andrew S. Hanen, Andrews & Kurth,* Houston, Tex., *Michael Butler, Andrews & Kurth,* Washington, D.C. and *J. W. Stewart,* in-house counsel, Houston, Tex.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named Respondents have been, and are, in violation of the provisions of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, issues its complaint, stating its charges as follows:

1. Respondent Hughes Tool Company (hereinafter "Hughes") is a Delaware Corporation and has its principal office at 5425 Polk Avenue, Houston, Texas. Hughes has capital, surplus, and undivided profits aggregating more than one million dollars ($1,000,000). Hughes is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Hughes conducts its business in part through its wholly-owned and controlled

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[*] Complaint dismissed as to respondent Ben F. Love by order of Oct. 18, 1983 (102 F.T.C. 1336).

subsidiaries BJ-Hughes Inc., Brown Oil Tools, Inc., and Regan Offshore International, Inc., and through Patso Company, Inc., which is a wholly-owned and controlled subsidiary of Brown.

2. Respondent Big Three Industries, Inc. (hereinafter "Big Three") is a Texas corporation and has its principal office at 3535 West Twelfth Street, Houston, Texas. Big Three has capital, surplus, and undivided profits aggregating more than one million dollars ($1,000,000). Big Three is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Big Three conducts its business in part through its wholly-owned and controlled subsidiary Bowen Tools, Inc. and through its division NOWSCO Services.

3. Respondent Ben F. Love is an individual. His business address is 712 Main Street, Houston, Texas.

4. On or about March 7, 1975, respondent Ben F. Love was elected a director of Big Three and served in such capacity until on or about November 16, 1979. On or about January 26, 1978, respondent Ben F. Love was elected a director of Hughes and has served in such capacity until the present.

5. During all or part of the period January 26, 1978, to the present, the business of Hughes and Big Three included but was not limited to, the manufacture, sale, and distribution in commerce of blowout preventers and/or parts thereof and the sale and provision in commerce of well stimulation services. During all or part of the period September 12, 1978, to the present, the business of Hughes and Big Three included, but was not limited to, the manufacture, sale, and distribution in commerce of coiled tubed units and/or parts thereof and wireline units and/or parts thereof, and the manufacture, sale and/or rental in commerce of fishing tools.

6. By the nature of their business as hereinabove described, Hughes and Big Three were competitors, concurrent with respondent Ben F. Love's membership on the Boards of Directors of Hughes and Big Three, during all or part of the period January 26, 1978, through and including November 16, 1979, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

7. Respondent Ben F. Love's simultaneous membership on the Board of Directors of respondents Hughes and Big Three constitutes violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Hughes, Big Three, and Ben F. Love.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondent Hughes Tool Company ("Hughes") with violation of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Hughes Tool Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5425 Polk Avenue, in the City of Houston, State of Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That the following definitions shall apply herein:

(a) *Parent* means any corporation which owns or controls, directly or indirectly, 50 percent or more of the issued and outstanding voting securities of another corporation.

(b) *Subsidiary* means any corporation of which 50 percent or more of the issued and outstanding voting securities is owned or controlled, directly or indirectly, by another corporation.

(c) *Director* does not include any foreign national who sits on the board of directors of a Hughes Subsidiary incorporated pursuant to the laws of a foreign sovereign, *provided,* that no more than 10 percent of the annual gross revenue of such Subsidiary (including the revenues of its Subsidiaries) is represented by exports to the United States of America and *provided,* that such foreign national does not also sit on the Board of Directors of Hughes or of a Hughes Subsidiary incorporated pursuant to the laws of any state of the United States of America.

(d) *Partially-Owned Foreign Corporation* shall mean any corporation which (1) is incorporated pursuant to the laws of a foreign sovereign, (2) is not owned, directly or indirectly, by Hughes or its Subsidiaries (other than a Partially-Owned Foreign Corporation) to the extent of 70 percent or more of the issued and outstanding voting securities and (3) either (i) generates no more than 10 percent of its annual gross revenue (determined in accordance with generally accepted accounting principles) by exports to the United States of America or (ii) because required by the law of the jurisdiction where the corporation is organized, at least 50 percent of the directors of the corporation are citizens or permanent residents of that jurisdiction.

(e) *Relevant Amount* shall mean the product of $5,000,000.00 (U.S.) multiplied by a fraction, the denominator of which is 258.71 and the numerator of which is the Consumer Price Index—All Items for Wage-Earners and Clerical Employees in the United States as published by the United States Department of Labor for the month of December of the year immediately preceding the year for which the calculation is being made for purposes hereof.

(f) *Qualifying Subsidiary* shall mean any Subsidiary which had revenue (determined in accordance with generally accepted accounting principles) for its immediately preceding fiscal year of an amount at least equal to the Relevant Amount.

II.

It is further ordered, That:

(a) Hughes, its successors and assigns, shall not permit on its board of directors or on the boards of directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation) any Director who also serves as a Director of any other corporation (other than Hughes or any of its Subsidiaries or a Partially-Owned Foreign Corporation) if Hughes and such other corporation are, by virtue of business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws of the United States of America (hereinafter referred to in this Order as an "interlock"), *provided,* that no such interlock shall be prohibited hereunder unless:

(1) The annual gross revenues (determined in accordance with generally accepted accounting principles) of Hughes and its Subsidiaries (other than a Partially-Owned Foreign Corporation) derived from a product or service sold or rented by Hughes or its Subsidiaries as to which Hughes competes with such other corporation exceeds the Relevant Amount, and

(2) The annual gross revenues (determined in accordance with generally accepted accounting principles) of such other corporation (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) derived from sales or rentals of a product or service as to which it competes with such product or service sold or rented by Hughes or its Subsidiaries exceeds the Relevant Amount.

(b) For the purpose of this Order, when an interlock occurs with any other corporation, competition between Hughes or any of its Subsidiaries (other than a Partially-Owned Foreign Corporation) and such other corporation or any of its Qualifying Subsidiaries or its Parents or its Parents' Qualifying Subsidiaries will be considered to be competition between Hughes and such other corporation. In addition, a product or service sold or rented by Hughes or its Subsidiaries shall only be considered competitive with a product or service sold or rented by another corporation if such products or services are sold or rented (a) in the same geographic market and (b) at the same level of the distribution process.

III.

It is further ordered, That:

(a) Within sixty (60) days after the date of service of this Order, and annually thereafter no later than April 1 of each calendar year, Hughes shall obtain, review and retain from each of its Directors and each person who has been nominated to be its Director and from each Director and each person who has been nominated to be a Director of each Hughes Subsidiary (other than a Partially-Owned Foreign Corporation), except Directors whose terms expire prior to June 1 of such calendar year and who are not standing for reelection, the following information concerning each corporation, its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries (other than

Hughes or any of its Subsidiaries or a Partially-Owned Foreign Corporation) of which such person serves as a Director:

(1) Name and address; and

(2) A descriptive list of each product or service for which the annual gross revenue of such corporation for its most recent fiscal year (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) exceeds the Relevant Amount.

(b) Hughes shall not permit any person to serve as a Director who fails to submit to Hughes the information required by this paragraph.

(c) Hughes shall provide the information received pursuant to this paragraph to the Commission's staff upon twenty (20) days' written request.

(d) If competition (as defined in Paragraph II above) arises as to any subject product or service between Hughes (or any of its Subsidiaries, other than a Partially-Owned Foreign Corporation) and any other corporation with which there is an interlock by virtue of action taken by such other corporation subsequent to the submission to Hughes under Paragraph III(a) above of information concerning such corporation, then Hughes shall have no obligations under Paragraph II above until May 1 of the year following the year such information was submitted.

(e) Hughes shall have a period of thirty (30) days after the date of the closing of an acquisition or the date upon which Hughes or any of its Subsidiaries commences the marketing of any such product or service, as the case may be, which creates an interlock that would otherwise be in violation of the terms of Paragraph II of this Order to remedy such interlock.

IV.

It is further ordered, That within ten (10) days from the date of service of this Order, Hughes shall distribute a copy of this Order to each of is current Directors and to each of the current Directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation). Thereafter, Hughes shall distribute a copy of this Order to each prospective Director of Hughes and to each prospective Director of each of its Subsidiaries (other than a Partially-Owned Foreign Corporation).

V.

It is further ordered, That Hughes shall:

(a) Within ninety (90) days after the date of service of this Order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order; and

(b) File with the Commission such other reports of compliance with this Order as may be requested by the Commission.

VI.

It is further ordered, That the obligations imposed upon Hughes under the terms of this Order shall become effective upon and continue for a period of ten (10) years following the date of service of this Order.

VIII.

It is further ordered, That Hughes shall notify the Commission not more than thirty (30) days after any change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation, which may affect the compliance obligations arising out of this Order.

In the Matter of

BIG THREE INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket 9138. Complaint, June 17, 1980—Decision, Jan. 16, 1984*

This consent order prohibits respondent from having on its board of directors any person who is a board member of a competing company, whose revenues derived from the relevant product or service exceeds 5 million dollars. Respondent must, among other things, institute an annual monitoring program designed to detect unlawful interlocks; permit only those persons who have submitted the information required by Paragraph III(a) of the order to serve as board members; and provide present and future directors and prospective directors, including those of its subsidiaries, with a copy of the order.

Appearances

For the Commission: *Steven E. Weart, Kristin Malmberg* and *Edward C. Johnson.*

For the respondent: *Willis Witt, Liddell, Sapp, Zivley, Brown & LaBoon,* Houston, Tex.

Decision and Order

The Commission having heretofore issued its complaint charging respondent Big Three Industries, Inc. ("Big Three") with violation of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

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* Complaint previously published at 103 F.T.C. 17 (1984).

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Big Three Industries, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 3535 West Twelfth Street, in the city of Houston, State of Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That the following definitions shall apply herein:

(a) *Parent* means any corporation which owns or controls, directly or indirectly, 50 percent or more of the issued and outstanding voting securities of another corporation.

(b) *Subsidiary* means any corporation of which 50 percent or more of the issued and outstanding voting securities is owned or controlled, directly or indirectly, by another corporation.

(c) *Director* does not include any foreign national who sits on the board of directors of a Big Three Subsidiary incorporated pursuant to the laws of a foreign sovereign, *provided,* that no more than 10 percent of the annual gross revenue of such Subsidiary (including the revenues of its Subsidiaries) is represented by exports to the United States of America and *provided,* that such foreign national does not also sit on the Board of Directors of Big Three or of a Big Three Subsidiary incorporated pursuant to the laws of any state of the United States of America.

(d) *Partially-Owned Foreign Corporation* shall mean any corporation which (1) is incorporated pursuant to the laws of a foreign sovereign, (2) is not owned, directly or indirectly, by Big Three or its Subsidiaries (other than a Partially-Owned Foreign Corporation) to the extent of 70 percent or more of the issued and outstanding voting securities and (3) either (i) generates no more than 10 percent of its annual gross revenue (determined in accordance with generally accepted accounting principles) by exports to the United States of

America or (ii) because required by the law of the jurisdiction where the corporation is organized, at least 50 percent of the directors of the corporation are citizens or permanent residents of that jurisdiction.

(e) *Relevant Amount* shall mean the product of $5,000,000.00 (U.S.) multiplied by a fraction, the denominator of which is 258.71 and the numerator of which is the Consumer Price Index—All Items for Wage-Earners and Clerical Employees in the United States as published by the United States Department of Labor for the month of December of the year immediately preceding the year for which the calculation is being made for purposes hereof.

(f) *Qualifying Subsidiary* shall mean any Subsidiary which had revenue (determined in accordance with generally accepted accounting principles) for its immediately preceding fiscal year of an amount at least equal to the Relevant Amount.

II.

It is further ordered, That:

(a) Big Three, its successors and assigns, shall not permit on its board of directors or on the boards of directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation) any Director who also serves as a Director of any other corporation (other than Big Three or any of its Subsidiaries or a Partially-Owned Foreign Corporation) if Big Three and such other corporation are, by virtue of business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws of the United States of America (hereinafter referred to in this Order as an "Interlock"), *provided,* that no such interlock shall be prohibited hereunder unless:

(1) The annual gross revenues (determined in accordance with generally accepted accounting principles) of Big Three and its Subsidiaries (other than a Partially-Owned Foreign Corporation) derived from a product or service sold or rented by Big Three or its Subsidiaries as to which Big Three competes with such other corporation exceeds the Relevant Amount, and

(2) The annual gross revenues (determined in accordance with generally accepted accounting principles) of such other corporation (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) derived from sales or rentals of a product or service as to which it competes with such product or service sold or rented by Big Three or its Subsidiaries exceeds the Relevant Amount.

(b) For the purpose of this Order, when an interlock occurs with any other corporation, competition between Big Three or any of its Subsidiaries (other than a Partially-Owned Foreign Corporation) and such other corporation or any of its Qualifying Subsidiaries or its Parents or its Parents' Qualifying Subsidiaries will be considered to be competition between Big Three and such other corporation. In addition, a product or service sold or rented by Big Three or its Subsidiaries shall only be considered competitive with a product or service sold or rented by another corporation if such products or services are sold or rented (a) in the same geographic market and (b) at the same level of the distribution process.

III.

It is further ordered, That:

(a) Within sixty (60) days after the date of service of this Order, and annually thereafter no later than April 1 of each calendar year, Big Three shall obtain, review and retain from each of its Directors and each person who has been nominated to be its Director and from each Director and each person who has been nominated to be a Director of each Big Three Subsidiary (other than a Partially-Owned Foreign Corporation), except Directors whose terms expire prior to June 1 of such calendar year and who are not standing for reelection, the following information concerning each corporation, its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries (other than Big Three or any of its Subsidiaries or a Partially-Owned Foreign Corporation) of which such person serves as a Director:

(1) Name and address; and

(2) A descriptive list of each product or service for which the annual gross revenue of such corporation for its most recent fiscal year (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) exceeds the Relevant Amount.

(b) Big Three shall not permit any person to serve as a Director who fails to submit to Big Three the information required by this Paragraph.

(c) Big Three shall provide the information received pursuant to this paragraph to the Commission's staff upon twenty (20) days' written request.

(d) If competition (as defined in Paragraph II above) arises as to any subject product or service between Big Three (or any of its Subsidiaries, other than a Partially-Owned Foreign Corporation) and any other corporation with which there is an interlock by virtue of action taken by such other corporation subsequent to the submission to Big Three under Paragraph III(a) above of information concerning such corporation, then Big Three shall have no obligations under Paragraph II above until May 1 of the year following the year such information was submitted.

(e) Big Three shall have a period of thirty (30) days after the date of the closing of an acquisition or the date upon which Big Three or any of its Subsidiaries commences the marketing of any such product or service, as the case may be, which creates an interlock that would otherwise be in violation of the terms of Paragraph II of this Order to remedy such interlock.

IV.

It is further ordered, That within (10) days from the date of service of this Order, Big Three shall distribute a copy of this Order to each of the current Directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation). Thereafter, Big Three shall distribute a copy of this Order to each prospective Director of Big Three and to each prospective Director of each of its Subsidiaries (other than a Partially-Owned Foreign Corporation)

V.

It is further ordered, That Big Three shall:

(a) Within ninety (90) days after the date of service of this Order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order; and

(b) File with the Commission such other reports of compliance with this Order as may be requested by the Commission.

VI.

It is further ordered, That the obligations imposed upon Big Three under the terms of this Order shall become effective upon and continue for a period of ten (10) years following the date of service of this Order.

VII.

It is further ordered, That Big Three shall notify the Commission not more than thirty (30) days after any change in the corporation such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation, which may affect the compliance obligations arising out of this Order.

IN THE MATTER OF

DICTOGRAPH PRODUCTS, INC.

ORDER TO SET ASIDE IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5655. Order, Sept. 24, 1953—Order To Set Aside, Jan. 17, 1984

The Federal Trade Commission has set aside the Sept. 24, 1953 order issued against Dictograph Products, Inc. (50 F.T.C. 281), in light of its actions in *Beltone Electronics Corp.*, Dkt. 8928 [100 F.T.C. 68 (1982)] and *Dahlberg Electronics Corp.*, Dkt. 8229 [101 F.T.C. 703 (1983)], which set aside prohibitions on the companies' use of exclusive dealing arrangements.

ORDER TO SET ASIDE ORDER TO CEASE AND DESIST

On September 24, 1953, the Federal Trade Commission issued an order against Dictograph Products, Inc. in Docket No. 5655 prohibiting Dictograph, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements upon its dealers. [50 F.T.C. 281]

Two of Dictograph's larger competitors are now permitted by recent Commission actions to engage in the same exclusive dealing practices contained in the order against Dictograph. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8928 [100 F.T.C. 68], challenging, among other things, the same practices prohibited by the order against Dictograph. On April 11, 1983, the Commission, in *Dahlberg Electronics, Inc.*, Docket No. 8929 [101 F.T.C. 703], set aside prohibitions on Dahlberg's use of exclusive dealing arrangements, which were similar to those contained in the order against Dictograph.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued an order to show cause why the proceeding herein should not be reopened to set aside the final cease and desist order in Docket No. 5655, prohibiting Respondent's use of exclusive dealing arrangements. Respondent was provided an opportunity to object to the proposed set aside of the order against it, and having failed to do so, is now deemed to have consented to such action. In view of the Commission's actions in *Beltone* and *Dahlberg*, the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that the order herein shall be set aside as of the effective date of this order.

In the Matter of

MACY'S NEW YORK, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-3130. Complaint, Jan. 31, 1984—Decision, Jan. 31, 1984

This consent order requires a major New York City department store, among other things, to comply with the billing error resolution procedures of the Fair Credit Billing Act (FCBA) and the provisions of Regulation Z, which implement the FCBA. This requires the company to acknowledge a customer's *written* billing error notice within 30 days; resolve the dispute or mail an explanation as to why a statement is believed correct within 2 billing cycles; and maintain for at least 2 years, records evidencing compliance with the Act's billing error resolution procedures. The order prohibits the company from attempting to collect any amount of a bill in dispute, including any finance charge computed on such amount; failing to include on its periodic statements a notice advising customers that disputed amounts need not be paid pending resolution of the dispute; failing to forfeit the right to collect the amount in dispute up to $50, should it fail to comply with the FCBA's billing error resolution procedures; and failing to timely credit payments to customers' accounts. Additionally, respondent must institute a comprehensive educational program for officers and employees who either establish the company's credit billing procedures or who respond to and resolve notifications of billing errors; conduct refresher courses annually for five years; and secure from such personnel a signed statement acknowledging that he/she has read the order, the FCBA, the provisions of Regulation Z, which implement the FCBA, and the educational materials explaining the Act and its requirements. Further, the company must timely establish a $225,000 redress fund to be apportioned equally among those customers who 1) held an open-end credit account with the store during the period (Jan. 1, 1977 through Dec. 31, 1978; and 2) who sent the store a written inquiry concerning a billing error at the address designated by it for receipt of billing error notifications.

Appearances

For the Commission: *Shirley F. Sarna.*

For the respondent: *Carl D. Lobell, Weil, Gotshal & Manges,* New York City.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and its implementing Regulation Z, duly promulgated by the Board of Governors of the Federal Reserve

System,* and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Macy's New York, Inc., a corporation, (hereinafter "respondent") has violated the provisions of said Acts and Regulation Z, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint:

PARAGRAPH 1. Respondent Macy's New York, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 151 West 34th Street, New York, New York.

PAR. 2. Respondent is now, and for some time has been, engaged in the purchasing, offering for sale, sale and distribution of general merchandise and related services to the public at retail.

PAR. 3. Respondent maintains, and has maintained at all times relevant hereto, a substantial course of business, including the acts and practices herein set forth, in or affecting commerce.

PAR. 4. At all times relevant hereto in the ordinary course and conduct of its business, respondent did and does regularly extend, offer to extend, arrange or offer to arrange *consumer credit* for its customers' purchases, and has been and is a *creditor* [as those terms are defined in Section 226.2(p) and (s) of Regulation Z, 12 C.F.R. 226.2(p) and (s), respectively]. The transactions involve the extension of *open end credit* [as defined in Section 226.2(x) of Regulation Z, 12 C.F.R. 226.2(x)].

Definitions: For the purpose of this complaint the following definitions are applicable:

a. *billing error* shall be defined as provided by Section 226.2(j) of Regulation Z, 12 C.F.R. 226.2(j).

b. *commerce* shall be defined as provided by Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

c. *consumer credit* shall be defined as provided by Section 226.2(p) of Regulation Z, 12 C.F.R. 226.2(p).

d. *creditor* shall be defined as provided by Section 226.2(s) of Regulation Z, 12 C.F.R. 226.2(s).

e. *customer* shall be defined as provided by Section 226.2(u) of Regulation Z, 12 C.F.R. 226.2(u).

f. *Fair Credit Billing Act* (hereinafter "FCBA") shall refer to Sections 161 through 171 of the Truth in Lending Act, 15 U.S.C. 1666–1666j, now in effect or as they may be amended.

g. *other charges* shall refer to late payment charges or other charges

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* All reference to the Truth in Lending Act and Regulation Z contained in this complaint shall refer to the Truth in Lending Act as amended to March 23, 1976 and Regulation Z as amended to March 23, 1977.

(excluding finance charges) imposed as the result of an erroneous billing.

h. *open end credit* shall be defined as provided by Section 226.2(x) of Regulation Z, 12 C.F.R. 226.2(x).

i. *proper written notification of a billing error* shall be defined as provided by Section 226.2(cc) of Regulation Z, 12 C.F.R. 226.2(cc).

j. *Regulation Z* shall refer to that version of Regulation Z, 12 C.F.R. 226, effective July 1, 1969, the implementing regulation of the Truth in Lending Act, now in effect or as it may be amended.

k. *Truth in Lending Act* shall refer to that version of the Act, 15 U.S.C. 1601 *et seq.*, now in effect or as it may be amended.

COUNT I

Alleging violations of the Truth in Lending Act and its implementing Regulation Z, and of the Federal Trade Commission Act, the allegations of Paragraph One through Four are incorporated by reference herein as if fully set forth verbatim.

PAR. 5. Subsequent to October 28, 1975, pursuant to its extensions of consumer credit and in the ordinary course and conduct of its business, respondent has received from numerous customers proper written notification of a billing error. In a substantial number of such instances respondent, after receipt of such notification, has:

1. Contrary to and in violation of the requirements of Section 226.14(a)(1) of Regulation Z, 12 C.F.R. 226.14(a)(1), failed and does fail to take any of the following actions within 30 days after receipt of the notification:

a. Mail or deliver to the customer a written acknowledgement;

b. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

c. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

2. Contrary to and in violation of the requirements of Section 226.14(a)(2) of Regulation Z, 12 C.F.R. 226.14(a)(2), failed and does fail to take either of the following actions within the lesser of 90 days or two complete billing cycles from the date of receipt of the notification:

a. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

b. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

3. Failed and does fail to retain for at least two years the customer's

notification of billing errors, copies of all correspondence in response thereto, and other evidence of compliance with Section 226.14(a) of Regulation Z, 12 C.F.R. 226.14(a), as required by Section 226.6(i) of Regulation Z, 12 C.F.R. 226.6(i).

PAR. 6. In a substantial number of instances subsequent to October 28, 1975, respondent, after receipt of proper written notification of a billing error, and prior to resolution of the billing dispute, has mailed and does mail subsequent periodic statements which include disputed amount(s) to the customer, but has failed and does fail to indicate on the face of the statement that payment of the amount(s) in dispute is not required pending resolution of the dispute, thereby violating the provisions of Section 226.14(b)(4) of Regulation Z, 12 C.F.R. 226.14(b)(4).

PAR. 7. In a substantial number of instances subsequent to October 28, 1975, respondent after receipt of proper written notification of a billing error and prior to resolution of the billing dispute, has begun action to collect the amount(s) indicated by the customer as being a billing error, finance or other charges computed on such disputed amount(s), thereby violating the provisions of Section 226.14(a)(2) of Regulation Z, 12 C.F.R. 226.14(a)(2).

PAR. 8. In a substantial number of instances subsequent to October 28, 1975, respondent, after receipt of proper written notification of a billing error and after resolution of a billing dispute in favor of the customer, has credited and does credit the customer's account in the disputed amount but has failed and does fail to credit any finance or other charges imposed as a result of the erroneous billing, in violation of the provisions of Section 226.14(b)(2) of Regulation Z, 12 C.F.R. 226.14(b)(2).

PAR. 9. In a substantial number of instances subsequent to October 28, 1975, respondent, having failed to comply with the requirements of Section 226.14 of Regulation Z, 12 C.F.R. 226.14, subsequently has failed and does fail to forfeit the amount indicated by the customer to be a billing error, *provided,* that amount does not exceed $50 for each item or transaction indicated to be a billing error, thereby violating Section 226.14(f) of Regulation Z, 12 C.F.R. 226.14(f).

PAR. 10. In a substantial number of instances subsequent to October 28, 1975, respondent has failed and does fail:

1. to credit payments to the customer's account as of the date such payments are received resulting in the imposition of additional finance or other charges; and

2. to credit to the customer's account during the customer's next billing cycle those finance or other charges imposed by respondent's

failure to post the customer's payments in sufficient time to avoid the imposition of such charges,

thereby violating the provisions of Section 226.7(g) of Regulation Z, 12 C.F.R. 226.7(g).

Par. 11. Pursuant to Section 103(s) of the Truth in Lending Act, 15 U.S.C. 1602(s), respondent's aforesaid failures to comply with the provisions of Regulation Z as set forth in Paragraphs Five through Ten constitute and have constituted violations of that Act and, pursuant to Section 108(c) thereof, 15 U.S.C. 1607(c), respondent has engaged and is now engaging in unfair or deceptive acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act, all to the prejudice and injury of the public.

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Eleven are incorporated by reference herein as if fully set forth verbatim.

Par. 12. By failing in certain instances, after receipt of written notification from customers questioning or disputing billed charges, to correct erroneous billings to the affected accounts, respondent caused substantial numbers of customers to be deprived of the use of their money resulting in substantial harm to consumers. Therefore, the acts and practices described in Paragraphs Five through Ten were and are unfair and/or deceptive.

Par. 13. The acts and practices of respondent set forth in Paragraph Twelve were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

COUNT III

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four are incorporated by reference herein as if fully set forth verbatim.

Par. 14. In the ordinary course and conduct of its business, respondent has mailed and does mail to its customers with its periodic statements, payment envelopes addressed to a post office box number which is not the same number as the post office box indicated on the face of the periodic statement to be used for proper written notification of a billing error. Notwithstanding the fact that the envelope is addressed to an address different from the one that respondent has for correspondence regarding billing errors, underneath the space for the customer's return address, respondent has provided a box next to the words "additional correspondence enclosed."

Par. 15. By and through its actions as alleged in Paragraph Fourteen, respondent misleads the customer into the belief that by checking the box marked "additional correspondence enclosed", the customer could properly include a letter to respondent regarding a billing complaint or error and properly invoke the provisions of the FCBA.

Therefore, the acts and practices alleged in Paragraph Fourteen are unfair, misleading and/or deceptive.

Par. 16. In the ordinary course and conduct of its business, respondent, in a substantial number of instances, has billed and does bill its customers for property or services significantly prior to actual delivery of the property or services to the customer. If the customer does not pay the bill promptly, respondent routinely imposes finance or other charges, which charges are not removed unless the customer properly notifies respondent that there has been a billing error.

Par. 17. By and through its actions as alleged in Paragraph Sixteen respondent has imposed a heavy burden on the customer, forcing the customer to properly notify respondent first, that there has been a billing error, that is, that the customer has been billed before delivery of property or services, and second, that an improper finance charge has been imposed. In truth and in fact, these so-called billing "errors" are routine and systematic practices and policies of respondent and they deprive the customer of the use of his or her money.

Therefore respondents acts are unfair.

Par. 18. In the ordinary course and conduct of its business, when respondent receives and has received notification of billing errors, in writing or orally, which do not constitute proper written notification of billing errors pursuant to the provisions of the FCBA, respondent has represented, directly or by implication, that disputes have been or will be resolved.

Par. 19. In truth and in fact in a substantial number of instances such errors were not resolved, or were resolved only after an unreasonable period of time had elapsed. Also in such instances, respondent does not disclose, and has not disclosed to these customers, that such notifications of billing errors do not preserve their rights under the FCBA.

Par. 20. By and through its actions as alleged in Paragraphs Eighteen and Nineteen, respondent causes customers to rely on misrepresentations that their billing disputes will be resolved and deprives customers of the use of money in those instances in which the customer is correct.

Therefore, respondent's acts and practices are unfair, misleading and/or deceptive.

Par. 21. In the ordinary course and conduct of its business, when respondent represents, directly or by implication, that disputes have been or will be resolved outside FCBA procedures, respondent implies that it has reasonable procedures to resolve billing disputes other than through the FCBA.

Par. 22. In truth and in fact, in a substantial number of such instances, respondent fails and has failed to take any action for several months, in many instances not until the customer has notified respondent of the dispute a second time or third time; sometimes respondent has taken no action at all. Moreover, in many instances in which respondent credits or has credited such customers' accounts after resolution of the error in the customers' favor, respondent fails and has failed to credit any finance or other charges on the credited amounts.

Par. 23. By and through its actions as alleged in Paragraphs Twenty-One and Twenty-Two, respondent unreasonably causes the customer to expend time, money and effort to have these disputes resolved and has deprived the customer of the use of his or her money in those instances in which the customer is correct.

Therefore respondent's acts and practices are unfair, misleading and/or deceptive.

Par. 24. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and is now, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of merchandise and services of the same general kind and nature as merchandise and services sold by respondent.

Par. 25. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Commissioners Pertschuk and Bailey voted in the negative.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Truth in Lending Act and the Regulation promulgated thereunder and violations of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such an agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent, Macy's New York, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 151 West 34th Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

Definitions: For purposes of this order[*] the following definitions shall apply:

a. *billing error* shall be defined as provided by Section 226.13(a) of Regulation Z, 12 C.F.R. 226.13(a).

b. *billing error notice* shall be defined as provided by Section 226.13(b) of Regulation Z, 12 C.F.R. 226.13(b).

c. *commerce* shall be defined as provided by Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

d. *consumer credit* shall be defined as provided by Section 226.2(a)(12) of Regulation Z, 12 C.F.R. 226.2(a)(12).

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[*] All reference to the Truth in Lending Act and Regulation Z contained in this order shall refer to the Truth in Lending Act as amended to March 31, 1980 and Regulation Z as amended to April 1, 1981.

e. *credit card* shall be defined as provided by Section 226.2(a)(15) of Regulation Z, 12 C.F.R. 226.2(a)(15).

f. *customer* shall mean *cardholder* which shall be defined as provided by Section 226.2(a)(8) of Regulation Z, 12 C.F.R. 226.2(a)(8).

g. *Fair Credit Billing Act* (hereinafter "FCBA") shall refer to Sections 127(a)(7), 127(b)(10), 161, 162 and 164 of the Truth in Lending Act, 15 U.S.C. 1637(a)(8), 1637(b)(11), 1666, 1666(a) and 1666(c), now in effect or as they may be amended.

h. *open end credit* shall be defined as provided by Section 226.2(a)(20) of Regulation Z, 12 C.F.R. 226.2(a)(20).

i. *other charges* shall refer to late payment charges or other charges (excluding finance charges) imposed as the result of an erroneous billing.

j. *reasonable investigation* shall refer to that investigation required by Section 226.13(f) of Regulation Z, 12 C.F.R. 226.13(f).

k. *Regulation Z* shall refer to that version of Regulation Z, 12 C.F.R. 226, effective October 1, 1982, the implementing regulation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, now in effect or as it may be amended.

l. *Truth in Lending Act* shall refer to that version of the Act, 15 U.S.C. 1601 *et seq.*, now in effect or as it may be amended.

I.

It is ordered, That respondent Macy's New York, Inc., a corporation, its successors and assigns or any other entity continuing its business, and respondent's officers, agents, representatives and employees acting as such, directly or through any corporation, subsidiary, division or other device, in connection with any extension of open end credit, including but not limited to consumer credit extended on an account by use of a credit card, shall forthwith cease and desist from:

A. Failing, within thirty (30) days after receipt of a billing error notice, to mail or deliver a written acknowledgement thereof to the customer, as required by Section 226.13(c)(1) of Regulation Z, unless:

1. the customer has agreed, within such thirty (30) day period, that the periodic statement is correct; or

2. respondent has taken the applicable action specified in Paragraph I.B.1–3 of this order within such thirty (30) day period.

B. Failing, not later than two (2) complete billing cycles and in no event more than ninety (90) days from the date of receipt of a billing error notice as required by Section 226.13(c) of Regulation Z to resolve the dispute by:

1. correcting the customer's account in the full amount indicated by

the customer to have been erroneously billed and mailing or delivering to the customer a notification of correction(s), in the manner required by Section 226.13(e) of Regulation Z; or

2. correcting the customer's account, after having conducted a reasonable investigation, by a differing amount from that indicated by the customer as being erroneously billed, and mailing or delivering to the customer an explanation of the change(s), accompanied by copies of documentary evidence of the customer's indebtedness if such evidence is requested by the customer, in the manner required by Section 226.13(f) of Regulation Z; or

3. mailing or delivering, after having conducted a reasonable investigation, a written explanation or clarification to the customer setting forth, to the extent applicable, the reason(s) why respondent believes the amount(s) was correctly shown on the periodic statement, and, if the customer so requests, furnishing copies of documentary evidence of the customer's indebtedness, in the manner required by Section 226.13(f) (1&2) of Regulation Z.

Provided, however, That respondent need not perform the actions specified in Paragraph I.B. if the customer has agreed, not later than two (2) complete billing cycles (and in no event more than ninety (90) days) from the date of receipt of the billing error notice, that the periodic statement is correct.

C. Failing to retain for at least two (2) years evidence of compliance with the provisions of the FCBA, as implemented by the applicable provisions of Regulation Z, as required by Section 226.25(a) of Regulation Z. Evidence of compliance shall include but not be limited to: a) customer billing error notices and attachments thereto; and b) copies of all respondent's correspondence in response. *Provided, however,* That respondent need not retain copies of standard form responses so long as respondent adequately identifies the forms used and the dates of mailing with respect to each customer's billing error notice.

D. Taking or causing any action, after receipt of a billing error notice, but prior to the time the dispute has been resolved as provided in Paragraph I.B. of this order, to collect:

1. any portion of an amount indicated in the customer's notification as being a billing error; or

2. any finance or other charge computed on such disputed amount,

in violation of Section 226.13(d)(1) of Regulation Z. *Provided, however,* That after receipt of a billing error notice respondent may include disputed amounts on subsequent periodic statements if respondent has provided the statement specified in Paragraph I.E. of this order.

E. Failing, after receipt of a billing error notice, and prior to resolution of the dispute, to indicate on or with the periodic statement that payment of the amount(s) in dispute pursuant to the provisions of Regulation Z is not required pending respondent's compliance with the provisions of Section 226.13 of Regulation Z, when mailing or delivering subsequent periodic statements which include disputed amount(s), as required by Section 226.13(d)(1) of Regulation Z.

F. Failing, after resolution of a billing error in favor of the customer pursuant to the provisions of Regulation Z, to credit any finance or other charges imposed as a result of the erroneous billing, as required by Section 226.13(e)(1) & (f)(3) of Regulation Z.

G. Failing to credit payments to customers' accounts as required by Section 226.10 of Regulation Z.

H. Failing to forfeit the right to collect the amount indicated by the customer to be a billing error and corresponding finance and other charges, providing that amount does not exceed $50, in instances when respondent fails to comply with the requirements of Section 226.13 of Regulation Z, as required by Section 161(e) of the Truth in Lending Act.

I. Failing to comply with any of the provisions of the Fair Credit Billing Act, as implemented by the applicable provisions of Regulation Z, 12 C.F.R. 226.6(d), 226.7(k), 226.9(a), 226.10, 226.13 and 226.25.

J. Failing to implement, within one hundred eighty (180) days after service of this order, an initial educational program, a full and complete description of which will have been received by and filed with the Commission as a supplemental report of compliance pursuant to Part VI of this order, for all of respondent's officers and employees who are responsible for establishing respondent's consumer credit billing policies and procedures, and also for those whose primary function is to respond to and resolve customers' written notifications of billing errors. The initial educational program shall consist of:

1. Furnishing to each such officer and employee a copy of this order, a copy of the FCBA and those portions of Regulation Z which implement the FCBA, and written educational materials which explain the FCBA and the provisions of Regulation Z which implement the FCBA, as they apply to respondent's credit billing and billing adjustment practices, including but not limited to Sections 226.6, 226.7, 226.9, 226.10, 226.13 and 226.25; and

2. Informing orally each such officer and employee, at a general meeting or otherwise, of the provisions of this order and of the duties of respondent and its officers and employees under the FCBA and the provisions of Regulation Z which implement the FCBA. Respondent shall submit a written agenda of its oral presentation to its employees

as part of the supplemental report of compliance filed pursuant to Part VI of this order; and

3. Securing a signed statement from each such officer that she or he has read this order, the FCBA, the provisions of Regulation Z which implement the FCBA, and the educational materials described in Paragraph J.1. and has received the instructions described in Paragraph J.2. A copy of each such statement shall be retained for at least three (3) years and shall be made available for inspection by a duly authorized representative of the Commission upon request.

K. Failing to provide the documents described in Paragraph J.1. hereof to each officer or employee who within five (5) years after the service of this order is given the responsibilities described in Paragraph J. hereof and to require each such officer to sign within twenty (20) days of the assumption of said responsibilities a statement that she or he has been so instructed. A copy of each such statement shall be retained for at least three (3) years and shall be made available upon request for inspection by a representative of the Commission.

L. Failing to conduct a refresher educational program at least once a year for five (5) years after acceptance of this order for all officers and employees having the responsibilities described in Paragraph J. hereof, for the purposes of explaining the requirements of the FCBA and the provisions of Regulation Z which implement the FCBA and explaining the responsibilities of such officers and employees in conformity with this order. Respondent shall:

1. Inform orally each such officer and employee, at a general meeting or otherwise, of the requirements of the FCBA and Regulation Z as they pertain to respondent's credit billing and billing adjustment practices.

2. If necessary to explain the requirements of, or any amendments to, the FCBA or to the provisions of Regulation Z which implement the FCBA, furnish each such officer or employee with written educational materials in addition to those described in Paragraph J.1. Such additional written materials shall be retained for a period of three (3) years and shall be made available upon request for inspection by a Commission representative.

M. Respondent shall not have liability under Part I of this order for any act in good faith done or omitted in conformity with any rule, regulation or interpretation thereof regarding the FCBA by the Federal Reserve Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe.

II.

Definitions: For purposes of Part II of this order:

a. *eligible customer* shall mean each and every person who held an open end credit account with respondent and who, during the period January 1, 1977 through December 31, 1978, sent a written inquiry concerning a billing error to respondent at P.O. Box 1516, New York, N.Y. In each and every instance, eligibility shall be determined without reference to the validity of the underlying claim.

b. any duty which is required to be performed on a specified day and which falls upon a non-business day shall be performed on the next following business day.

It is further ordered, That respondent Macy's New York, Inc., a corporation, its successors and assigns or any other entity continuing its business, and respondent's officers, agents, representatives and employees acting as such, directly or through any corporation, subsidiary, division or other device, in connection with open end credit accounts created or maintained in connection with the sale of merchandise or services to the public, in or affecting commerce, shall:

A. Submit to the New York Regional Office of the Federal Trade Commission ("NYRO"), on or before the forty-fifth (45th) day after the date this order is served on respondent ("date of service"), a list or compilation of the names and addresses of all persons identified by respondent as eligible customers.

B. Add to its compilation of eligible customers each and every person on file with NYRO who is an eligible customer and who is not included in respondent's compilation. NYRO shall provide the names of each such eligible customer to respondent on or before the fiftieth (50th) day after the date of service.

C. Submit to NYRO, on or before the sixtieth (60th) day after the date of service, a notarized affidavit, executed by a Senior Vice President of respondent, to the effect that respondent has made or has caused to be made a good faith search of documents relating to billing error disputes in its customer service departments, including those handling the general merchandise, bill adjustments, furniture, and rugs and floor coverings departments, in order to locate the names and addresses of all eligible customers under Part II of this order.

D. Deposit, on or before the tenth (10th) day after the date of service, the sum of two hundred twenty-five thousand dollars ($225,000) into an account at a banking institution to be agreed upon between respondent and NYRO. The principal amount of said bank account shall be available only for the payment of refunds under Part II of this order. No charges against this amount shall be made for administrative costs, which costs shall be paid by respondent. Respondent shall retain any interest accrued on this account, if any.

E. On or before the fifty-fifth (55th) day after the date of service, make or cause to be made a search of its active open end credit files and shall obtain the address used for mailing or delivery or periodic statements ("billing address") for each and every eligible customer who has an active open end credit account with respondent.

F. On or before the sixtieth (60th) day after the date of service, mail or cause to be mailed by first class mail to each eligible customer who does not have an active open end credit account with respondent, at his or her last known billing address, (1) a notification ("Notification") in the language, manner and form set forth in Appendix A; together with, (2) a self-addressed, postage prepaid response form in the language, manner and form set forth in Appendix B.

G. Designate a separate mailing address which shall be used solely for purposes of receiving the response forms pursuant to Paragraph II.F. of this order.

H. With respect to each Notification returned undelivered, ascertain or cause to be ascertained whether the mailing address appearing on such Notification has been accurately transcribed from respondent's records. Respondent or its designee shall thereafter, on or before the ninety-fifth (95th) day after the date of service, correct any addresses inaccurately transcribed and mail or cause to be mailed all returned Notifications in the same manner and form set forth in Paragraph II.F. of this order.

I. On or before the one hundred twentieth (120th) day after the date of service, apportion or cause to be apportioned equally the sum of two hundred twenty-five thousand dollars ($225,000) among the eligible customers for whom respondent has obtained a current mailing address pursuant to Paragraphs II.E., II.F. and II.H., and mail, or cause to be mailed by first class mail, a refund by check to each such eligible customer. Each refund shall be accompanied by a letter in the language, manner and form set forth in Appendix C.

J. With respect to each mailed refund which is returned undelivered, ascertain or cause to be ascertained whether the mailing address appearing on each such refund is accurately transcribed from the current mailing addresses obtained by respondent pursuant to Paragraphs II.E., II.F. and II.H. Respondent or its designee shall thereafter correct any addresses inaccurately transcribed and shall thereafter mail or cause to be mailed all the returned refunds in the same manner and form set forth in Paragraph II.I. of this order.

K. On or before the two hundredth (200th) day after the date of service, file with NYRO a report in writing setting forth the manner and form in which it has complied with Part II of this order.

L. Maintain for two (2) years after the date of the last act required by Order II, records and documents evidencing its compliance with Part II of this order.

III.

It is further ordered, That respondent Macy's New York, Inc., a corporation, its successors and assigns or any other entity continuing its business, and respondent's officers, agents, representatives and employees, acting as such, directly or through any corporation, subsidiary, division or other device, in connection with open end credit accounts created or maintained in connection with the sale of merchandise or services to the public, in or affecting commerce, shall forthwith cease and desist from:

A. Including the statement "additional correspondence enclosed" or a statement to that effect on preaddressed envelopes mailed or delivered to customers for the payment of the customers' bills, unless the words "Billing error notices must be mailed to (address used by respondent for receipt of billing error notices).", or substantially similar words, are included immediately adjacent to any such statement. *Provided, however,* That when only using the words "order enclosed" or "address change enclosed" or words to that effect, on such preaddressed envelopes, respondent need not set forth the notice required by this paragraph.

B. Billing its customers prior to delivery for furniture, broadloom carpeting, mattresses, or major appliances delivered from respondent's warehouse distribution center. *Provided, however,* That (1) when delivery of merchandise is deferred at the request of a customer, respondent may bill the customer at the time the merchandise is available for delivery; and (2) nothing in this paragraph shall prohibit respondent from billing customers for any deposits required by respondent and agreed to by the customer prior to delivery of the merchandise.

C. Failing to post in a prominent location in each area designated by respondent for bill adjustments in each of its stores, a sign to be displayed to the public which is not smaller in dimension than twenty-four (24) inches by thirty-six (36) inches, and which sets out, clearly and conspicuously, the information provided in Appendix D.

D. Failing, in instances in which respondent provides a telephone number on the periodic statement, to include clearly and conspicuously on that part of each periodic statement which is retained by the customer, a notice, adjacent to such telephone number, in substantially the following language: "If you telephone us with a billing inquiry, you do not protect your rights under federal law. To do so, write to us at the address indicated on this statement or accompanying statement for billing inquiries."

IV.

It is further ordered, That, in the event that respondent Macy's New York Inc., a corporation, its successors and assigns or any other entity continuing its business, provides customer complaint resolution procedures, in addition to those specifically required by the FCBA, or causes customers to waive or forfeit their rights under the FCBA, it shall forthwith cease and desist from:

A. Representing, directly or by implication, that it will resolve disputes regarding billing errors within a reasonable period of time after receipt of written notifications of such billing errors, unless respondent in fact resolves such disputes within a reasonable period of time.

For purposes of this Part of the Order, *written notifications of billing errors* shall mean (1) written notifications of billing errors made at the area designated by respondent for bill adjustments on a form which shall be provided by respondent for that purpose; or (2) written notifications of billing errors (other than those reported to respondent through a billing error notice pursuant to the provisions of the FCBA) addressed to respondent as follows: a) address disclosed by respondent on its billing statement for receipt of payments from customers; or b) Macy's, New York, New York or Macy's at its Herald Square store.

Written notifications shall not include any written inquiries directed to any individual by name, title or position, other than chairman of the board or president or those addressed to the customer service department.

For purposes of this Part of the order the term *resolve* shall mean (1) correcting the customer's account in the amount of the error; (2) after a reasonable investigation, correcting the customer's account by a differing amount from that indicated by the customer as being erroneously billed, and mailing to the customer a written explanation of the change(s); or (3) after a reasonable investigation, setting forth to the customer, in writing, the reasons why respondent believes that the amount was correctly shown on the customer's periodic statement. *Provided, however,* That if the customer makes a billing inquiry at the area designated by respondent for bill adjustments and the billing error is resolved at that time, any explanations or notifications of correction may be conveyed orally to the customer at that time.

B. Failing to credit any finance or other charges imposed as a result of an erroneous billing in each instance in which: (1) respondent has resolved a billing error dispute in favor of the customer; and (2) notification of the billing error was in writing addressed to any of the locations specified in Paragraph IV.A of this order but not reported to respondent through a billing error notice pursuant to the provisions of the FCBA.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in the corporation, including the creation or dissolution of subsidiaries, which may affect compliance obligations arising out of this order.

VI.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order, and within one hundred eighty (180) days after service upon it of this order, file with the Commission a written supplemental report setting forth a full and complete description of the initial educational program required by this order.

Commissioners Pertschuk and Bailey voted in the negative.

APPENDIX A

(Macy's Letterhead)

(Date)

(Name)
(Address)

Re: Refund for Eligible Macy's
Credit Card Customers per
Macy's/Federal Trade Commission
Consent Agreement

Dear Customer:

Macy's New York, Inc. has entered into a Consent Agreement with the Federal Trade Commission regarding the Fair Credit Billing Act. As part of the Agreement, Macy's has established a fund of $225,000 which will be divided equally among customers who wrote to our billing inquiry address during the years 1977 and 1978. Our records indicate that you are eligible for such a refund.

The purpose of this letter is to make certain that Macy's has your present mailing address. Please complete the attached address verification form and return it within twenty-five (25) days in the enclosed prepaid envelope. Only those who complete and return this response form within 25 days after the above date will receive a refund. The refund will be mailed to you within 90 days of our receipt of the response form.

Very truly yours,

MACY'S NEW YORK, INC.
BY________________________
(Name)
Vice President

APPENDIX B

(Response form)

Please mail my refund to:
Name ________________________

Address ________________________
(Street)
____
(City)
____
(State) (Zip Code)

APPENDIX C

(Macy's Letterhead)

(Date)

Re: Refund for Eligible Macy's
Credit Card Customers per
Macy's/Federal Trade Commission
Consent Agreement

Dear Customer:

Macy's New York, Inc. has entered into a Consent Agreement with the Federal Trade Commission regarding the Fair Credit Billing Act. As part of this Agreement, Macy's has established a fund of $225,000 which has been divided equally among customers who wrote to our billing inquiry address during the years 1977 and 1978.

Our records indicate that you are eligible for such a refund. Therefore, please find enclosed your check in the amount of __________.

Very truly yours,

MACY'S NEW YORK, INC.
By ________________________
(Name)
Vice President

APPENDIX D

IF YOU HAVE A BILLING COMPLAINT

TO PROTECT YOUR RIGHTS UNDER FEDERAL LAW YOU MUST *WRITE* WITHIN 60 DAYS OF THE DATE OF THE BILL

Macy's Address
Box # ________________________
____
____

Include:

(a) your name and account number;
(b) the dollar amount of the suspected error;
(c) why you believe there is a possible mistake.

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2059. Consent Order, Oct. 8, 1971—Modifying Order, Feb. 3, 1984

This order reopens the proceeding and modifies the Commission's order issued on Oct. 8, 1971 (79 F.T.C. 589), *modified* Feb. 26, 1974 (83 F.T.C. 1354), to ensure that consumers receive necessary information regarding promotions involving chance while allowing the company to publicize such promotions more effectively and efficiently. The modified order changes the disclosure requirements for broadcast and print advertising, and includes a "trigger" modeled on that in the Commission's Games of Chance Rule. The "trigger" would require certain disclosures in print advertisements which "refer in any manner to prizes or their number or availability."

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On May 2, 1983 Procter & Gamble Company, respondents in the above captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the consent order entered therein. By letter dated October 21, 1983, petitioner agreed to modify its original proposal.

The order relates to alleged unfair and deceptive practices by Procter & Gamble in connection with any use of a "sweepstakes" or other similar promotional device involving chance. Paragraphs A(1) and B(1)(2)(3) and (4) of the order require petitioner to disclose in all advertising and promotional material: (1) the total number of prizes to be awarded, (2) the exact nature of the prizes, their approximate retail value, and the number of each, (3) the geographic area or states in which any such device is used, and (4) the date the device is initiated and the date the device is to end. Other provisions of the order prohibit petitioner from failing to award all of the prizes as represented, from falsely representing that prizes have already been purchased, from failing to furnish a list of winners on request, and from misrepresenting any aspect of any promotional device involving chance. Procter & Gamble seeks modification only of the disclosure requirements contained in paragraphs A(1) and B(1)(2)(3) and (4) of the order.

Petitioner requests the establishment of different disclosure requirements for broadcast and print advertising, and the lessening of the requirements for both types of ads. In place of the current broadcast advertising requirements petitioner requests those set out in proposed paragraph C. This paragraph would require petitioner to disclose in all advertising: (1) the geographic area or states in which the device is used *if* the advertisement would reach consumers outside that area, (2) the date the device is to end *if* the advertising would be disseminated within less than thirty days before such ending date and, (3) the date the device is to begin *if* the advertising would be disseminated prior to that beginning date. No other disclosures would be required in broadcast advertisements.

Petitioner argues that the changes in the broadcast advertising requirements of the order are justified by changes in law and fact and by the public interest. Petitioner points to nearly identical consent orders against three pesticide producers in which fewer disclosures were required in certain broadcast advertisements than were required in print advertisements. *Union Carbide,* 84 F.T.C. 591 (1974), *modified,* 86 F.T.C. 1231 (1975), *modified,* 94 F.T.C. 315 (1979); *Hercules, Inc.,* 84 F.T.C. 605 (1974), *modified,* 86 F.T.C. 1236 (1975), *modified,* 94 F.T.C. 315 (1979); *FMC Corp.,* 86 F.T.C. 897 (1975), *modified,* 94 F.T.C. 315 (1979). Petitioner also argues that the prize information disclosure requirement amounts to a virtual ban on broadcast advertising of its sweepstakes. Finally petitioner argues that at the time the order was entered into television advertising of sweepstakes promotions was virtually nonexistent, whereas today such advertising is increasingly common and petitioner's inability to place such advertisements places it at competitive disadvantages.

Petitioner also proposes that the order's print advertising disclosure requirements be modified by introducing a "trigger." Under this approach, the disclosures listed in paragraphs A and B would be required only in print advertisements which "refer in any manner to prizes or their number or availability." Print advertising which does not set off the trigger would still have to meet the disclosure requirements of paragraph C, however. Petitioner also proposes special provisos to paragraphs A, B and C. The provisos to paragraphs A and B would allow petitioner to place disclosures triggered by advertisements on package labels on material other than the labels themselves, as long as statements on those packages directed consumers to those disclosures. The proviso to paragraph C would allow petitioner to place any disclosures required by that paragraph on the side or back of packages as long as a statement on the front of the package informed consumers of the disclosures' location.

Finally, petitioner contends that the addition of the "trigger" to the order's print advertising disclosure requirements is justified by changes in law and the public interest. In support, petitioner points to the consent order in *Coca-Cola Co.,* 88 F.T.C. 656 (1976) that regulates the conduct of contest promotions and includes trigger language related to the kind of disclosures required by that order.

With respect to the deletion of the obligation to disclose prize information in broadcast advertisements we note that in January 1983 we issued a temporary stay of those portions of our Trade Regulation Rule on Games of Chance in the Food Retailing and Gasoline Industries (16 C.F.R. 419) which required the disclosure of prize information in broadcast advertising.[*] (48 FR 1046) This stay will remain in effect pending the conclusion of proceedings to amend that rule. Thus the modification makes petitioner's obligation more consistent with that presently imposed by the rule. Moreover, in this case petitioner's advertising of prize information will remain subject to paragraph A.(5) of the order which forbids petitioner from "misrepresenting in any manner by any means any element, feature, or aspect of any 'sweepstakes,' contest, game or any similar promotional device involving chance."

Similarly, we believe that conditioning disclosure in broadcast advertising of the starting and ending dates and geographic scope of a promotion is also justified by the public interest. Paragraph C of the modified order requires these disclosures whenever they are necessary and helpful to the consumer.

Finally, adoption of a trigger modeled on that contained in our Games of Chance Rule is also in the public interest. The disclosures required in Procter & Gamble's order are similar to those required in the Games of Chance Rule. Both require disclosure of detailed prize information. This requirement is present in the order against petitioner to ensure that consumers are not deceived about the value and nature of the prizes by vague or incomplete references to prizes in advertising. Therefore, the trigger used in the Games of Chance Rule —any reference to prizes—is appropriate for use in petitioner's order. The insertion of this trigger language serves the public interest by more closely tailoring the disclosure requirements to the purposes they serve. The provisos relating to disclosures on package labels are also justified by the public interest. They allow petitioner to provide more information to consumers on package labels than would otherwise be possible under the order, while still ensuring that the required disclosures are available for consumers to view. This increased flow of information to consumers is in the public interest.

Thus, the Commission finds that the changes requested in Procter & Gamble's modified petition are in the public interest. The modified order will ensure that consumers receive necessary information regarding promotions involving chance, while allowing petitioner to publicize such promotions more effectively and efficiently.

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[*] This rule applies only to the food retailing and gasoline industries. It does not apply to petitioner's activities in the sweepstakes area, which are governed solely by the order.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued October 8, 1971, as modified February 26, 1974, in Docket No. C–2059 is hereby modified to read as follows:

ORDER

It is ordered, That the Procter & Gamble Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the preparation, advertising, sale, distribution or use of any "sweepstakes," contest, game or any similar promotional device involving chance in commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. (1) Failing to disclose clearly and conspicuously the exact number of prizes which will be awarded, the exact nature of the prizes and the approximate retail value of each prize offered in all print advertising and printed promotional materials which refer in any manner to prizes or their number or availability. *Provided, however,* That such disclosures in any case need not be made on any package label as long as somewhere on that same package consumers are clearly and conspicuously referred to advertising or promotional material which does contain such disclosures and which may be viewed by consumers without any purchase or other monetary outlay.

(2) Failing to award and distribute all prizes of the type and value represented.

(3) Representing directly or by implication that prizes other than cash prizes have been purchased unless they have in fact been purchased at the time that the representation is made.

(4) Failing to furnish upon request to any individual a complete list of the names and states of residence of winners of major prizes, identifying the prize won by each.

(5) Misrepresenting in any manner by any means any element, feature, or aspect of any "sweepstakes," contest, game or any similar promotional device involving chance.

B. Engaging in the preparation, promotion, sale, distribution, or use of any "sweepstakes," contest, game, or similar promotional device involving chance, unless the following are disclosed clearly and conspicuously in all print advertising and printed promotional material which refer in any manner to prizes or their number or availability. *Provided, however,* That except as provided in Paragraph C of this order, such disclosures in any case need not be made on any package label as long as somewhere on that same package consumers are clearly and conspicuously referred to advertising or promotional material which does contain such disclosures and which may be viewed by consumers without any purchase or other monetary outlay.

(1) The total number of prizes to be awarded;

(2) The exact nature of the prizes, their approximate retail value, and the number of each;

(3) The geographic area or states in which any such device is used; and

(4) The date the device is initiated and the date the device is to end.

C. Engaging in the preparation, promotion, sale, distribution, or use of any "sweepstakes," contest, game, or similar promotional device involving chance, unless the following are disclosed clearly and prominently in all advertising or promotional material concerning said devices:

(1) The geographic area or states in which any such device is used if the advertising or promotional material would reach consumers outside such geographic area or states; and

(2) The date the device is to end if the advertising or promotional material would be disseminated within less than thirty days before such ending date.

(3) The date the device is to begin if the advertising or promotional material would be disseminated prior to such beginning date.

Provided, however, That in advertising or promotional material printed on package labels it shall be sufficient if such advertising or promotional material contains the clear and conspicuous disclosure of the statement "See back/side for details" and any required information about geographic areas or states and/or ending or beginning dates is then disclosed clearly and conspicuously elsewhere on the package.

It is further ordered, That respondent Procter & Gamble Company shall;

(1) File with the Commission, within sixty (60) days after service upon it of this order, a report in writing setting forth in detail the manner and form in which it has complied with the provisions of this order;

(2) Maintain adequate records:

(a) which disclose the facts upon which any of the representations of the type described in the preceding paragraphs of this order are based, and

(b) from which the validity of the representations of the type described in the preceding paragraphs of this order can be determined;

(3) Furnish upon the request of the Federal Trade Commission:

(a) a complete list of the names and addresses of the winners of each prize, and an exact description of the prize, including its retail value;

(b) a list of the winning numbers or symbols, if utilized, for each prize;

(c) the total number of coupons or other entries distributed;

(d) the total number of participants in the promotion;

(e) the total number of prizes in each category or denomination which were made available; and

(f) the total number of prizes in each category or denomination which were awarded.

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in its corporate form such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance with this order.

Commissioner Pertschuk voted in the negative.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8918. Modified Order To Cease and Desist, April 8, 1983—
Modifying Order, Feb. 7, 1984

This order modifies the Commission's Modified Order to Cease and Desist issued on April 8, 1983 (101 F.T.C. 698), to permit the company to substantiate superiority or freedom-from-side-effects claims with competent and reliable scientific evidence, as is required of its competitors, Bristol-Meyers Co. and Sterling Drug Co. Previously, the company was required to substantiate such claims with two or more well-controlled clinical investigations.

ORDER MODIFYING ORDER TO CEASE AND DESIST

In response to the Commission's Order to Show Cause issued January 12, 1984, respondent American Home Products Corporation (AHP) and complaint counsel have consented to modify the Order of April 8, 1983 [101 F.T.C. 698] in this matter to allow AHP to make comparative analgesic efficacy claims under paragraph I(B) that are based on the reasonable basis standard for such claims established in the Commission's decisions in *Bristol-Myers Company,* Docket No. 8917 [102 F.T.C. 21] and *Sterling Drug, Inc.,* Docket No. 8919 [102 F.T.C. 395]. The Commission agrees that such modification should be made.

Accordingly, *it is hereby ordered* that the Order be reopened and paragraph I(B) thereof be modified by adding the word "or" to the end of paragraph I(B)(2) and adding the following new paragraph I(B)(3):

3. Respondent, at the time such representation is made, possesses a reasonable basis for making that representation. A reasonable basis for such a representation shall consist of competent and reliable scientific evidence supporting it.

It is further ordered, That with this modification, the Commission's stay of paragraph I(B) is hereby lifted and the entire Order as modified shall take effect 90 days from our January 12, 1984 order, as contemplated by our Stay order of April 8, 1983.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

File No. 821 0159. Interlocutory Order, Feb. 7, 1984

The Commission dismissed in part and denied in part Chrysler Corporation's petition seeking release of GM, Toyota and staff documents and analyses on which the Commission based its decision to provisionally accept the consent agreement permitting the GM/Toyota joint venture to manufacture new small cars in the U.S. The Commission noted that staff documents and the GM/Toyota memorandum of understanding were already on the public record. The Commission denied a request to disclose those portions of staff documents that contained trade secrets or commercial or financial information. In denying Chrysler's request for an extension of the 60-day comment period, the Commission stated that adequate time remains for interested persons to review the staff documents and complete their comments.

ORDER DISMISSING IN PART AND DENYING IN PART PETITION BY CHRYSLER CORPORATION FOR DISCLOSURE OF CERTAIN NON-PUBLIC INFORMATION AND EXTENSION OF PUBLIC COMMENT PERIOD ON A PROPOSED CONSENT AGREEMENT

On January 10, 1984, Chrysler Corporation filed a petition in File No. 821 0159. That file concerns an agreement to a proposed consent order with General Motors Corporation and Toyota Motor Corporation that the Commission has provisionally accepted. The agreement has been placed on the public record for 60 days so that interested persons may comment on it [48 FR 57246 (Dec. 28, 1983)]. At the close of this period the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the proposed consent order, in accordance with its rules. 16 C.F.R. 2.34 (1983). [103 F.T.C. — (1984)]

The agreement concerns a joint venture between General Motors and Toyota which those firms proposed in a memorandum of [2] understanding dated February 17, 1983. The joint venture would manufacture small new automobiles in the United States.

Chrysler's petition requests the Commission to [1] "release the GM, Toyota and staff documents and analyses on which it acted [in provisionally accepting the agreement], and [2] provide that the 60-day comment period does not expire until 60 days after those documents have been released."

Chrysler's Contentions

The petition complains that the memorandum of understanding between General Motors and Toyota has been improperly redacted to eliminate the formula by which the joint venture will price the vehicles to be manufactured, and that the staff analyses, including consultants' reports, have not been made available to the public at all. Without these documents, the petition contends, the comment process provided in the Commission's rules is meaningless. It asserts that there is no legal basis for deletion of any information from the memorandum of understanding or for the withholding of the other documents requested.

Specifically, Chrysler argues that Section 21(b) of the FTC Act, 15 U.S.C. 57b–2(b), is irrelevant because it applies only to material obtained by compulsory process for law enforcement purposes. It further contends that Section 7A(h) of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a(h), expressly permits the Commission to disclose such information, including confidential business information, "as may be relevant to any administrative or judicial action or proceeding," and that this provision authorizes such disclosure during public comment [3] on a proposed consent order under Commission Rule 2.34. Section 6(f) of the FTC Act, 15 U.S.C. 46(f), which denies the Commission authority to make public trade secrets or commercial or financial information that is privileged or confidential, is said to be inapplicable as a matter of law. Alternatively, this restriction is said to be inapplicable because disclosure of the information sought would not cause any submitter substantial competitive injury. This information, it is argued, meets neither the test for Section 6(f), nor the standards which would justify a protective order under the Commission's rule authorizing *in camera* orders in adjudications. 16 C.F.R. 3.45(b).

As we understand its petition, Chrysler does not actually request the Commission to make disclosures to public commenters under an order providing *in camera* treatment for confidential commercial information and trade secrets. Rather, Chrysler seeks public disclosure of all information contained in the documents at issue (Pet. at 13). It disavows, nevertheless, any purpose to cause the release of information in violation of applicable statutes and rules.[1]

For the reasons set forth below, the petition is dismissed as moot insofar as it requests the release of the staff documents [4] and analyses on which the Commission acted, and portions of the GM/Toyota memorandum of understanding not initially released by the Commission. The staff documents were placed on the public record January

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[1] The petition also refers to remarks allegedly made by the Commission's General Counsel during a meeting with Chrysler's counsel on December 19, 1983, supposedly stating that the GM-Toyota memorandum of understanding contains no confidential material. As the General Counsel explained in his letter to Chrysler's counsel of December 29, 1983, he was not discussing Sections 6(f) and other statutory limitations on disclosure, but Chrysler's possible discovery rights in a private antitrust suit. Moreover, the General Counsel's opinion does not bind or estop the Commission.

25, 1984. The full text of the memorandum of understanding was also placed on the public record on February 3, 1984 after it was revealed by General Motors Corporation in a public filing February 1, 1984 in Chrysler's antitrust suit challenging the proposed joint venture (D.D.C. No. 84–115). The petition is denied insofar as it seeks disclosure of material contained in the staff documents and analyses which are trade secrets or commercial or financial information that remains confidential and privileged within the meaning of Section 6(f) of the FTC Act, or which were obtained by compulsory process, or obtained in lieu thereof and designated confidential by its submitters as provided in 16 C.F.R. 4.10(d) (1983). The request for extension of the 60-day comment period is also denied on the ground that adequate time remains for interested persons to review the staff documents and complete their comments.

Our decision is based upon our evaluation of relevant policies governing the disclosure of confidential business information obtained by compulsion of law or the threat of such compulsion, and the controlling statutes and regulations. We have also considered the appropriateness of disclosing confidential information to commenters in this consent order proceeding subject to some form of protective order. [5]

1. Confidential business information is subject to an important but qualified right of privacy.

At the outset we note that the information sought concerns nontrial materials obtained from the parties to the joint venture, GM and Toyota, and numerous third parties in the automobile industry for purposes of the Commission's investigation of the transaction. These materials, moreover, were obtained under government compulsion, *i.e.*, either under the compulsion of the Hart-Scott-Rodino Act, or by virtue of subpoena or voluntarily in lieu of subpoena. To the extent that information thus furnished to the government involves trade secrets and commercial or financial information that is privileged and confidential, it implicates an important interest in privacy recognized in discovery rules (Fed. R. Civ. P. 26(c)(7)), statutes (*e.g.*, Sections 6(f) and 21(d)(1)(B) of the FTC Act and 18 U.S.C. 1905); the Freedom of Information Act, 5 U.S.C. 552(b)(4); and the common law (Restatement of Torts Section 759). It has also been held (*Tavoulareas* v. *The Washington Post Company, et al.*, D.C. Cir. No. 80–3032, decided January 6, 1984, slip op. 27–28):

> Given the long tradition of common law protection of confidential commercial information * * * and the crucial importance of such material to continuing business operations, a company's sensitive commercial documents not yet in the public domain fall within the constitution's protection of corporate privacy interests. Few categories of business

information are more analogous to individuals' constitutionally protected personal affairs than trade secrets and related commercial information.

This privilege is not absolute. It must give way to the government's lawful needs for information where necessary to [**6**] allow adequate policing of corporate behavior. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 651–652 (1950). But the government's need to intrude upon business privacy must be balanced against the severity of the intrusion. The more severe the intrusion the more compelling must be the interests invoked to justify it. " 'Severe' intrusions include public dissemination of confidential information as opposed to disclosure of such information only to the government or other litigants." *Tavoulareas, supra,* slip op. at 27. We need not, however, undertake on this petition an *ad hoc* balancing of constitutional factors. Congress and our regulations have struck the balance for us.

2. Tentative consent agreements are non-adjudicative reports under Section 6 of the FTC Act.

We are concerned here with a demand for general public disclosure of information in aid of public comments we have invited under a non-adjudicative procedure. That procedure is not required by statute, but rather, is established only by discretionary regulations (16 C.F.R. 2.34 (1983)) that are not based on statutes authorizing release of confidential business information. *Cf. Chrysler Corp.* v. *Brown*, 441 U.S. 281, 303–312 (1979) (agency regulation insufficient to authorize disclosure absent statute).

Our procedure contrasts sharply with the adjudicative procedures Congress has authorized in the Tunney Act before an Article III *court* may enter an antitrust consent judgment agreed to by the Department of Justice. 15 U.S.C. 16(b)–(h).[2] Those procedures are necessary because the tribunal that may enter such [**7**] a consent judgment—a United States District Court—does not have access to the investigation conducted by the Department of Justice. When the Commission accepts a consent, however, it has full access to its staff's investigation, and acts initially on the basis of that access. The purpose of the public comment period under our regulations is not to provide new evaluations of the staff's investigation by other interested persons, but to bring forth additional facts or objections that might indicate to the Commission that a proposed consent order is not in the public interest, but that further negotiation or formal adjudication might be. *See e.g., Ford Motor Co.* v. *Federal Trade Commission*, 547 F.2d 954 (6th Cir. 1976); *Johnson Products Co.* v. *FTC*, 549 F.2d 35 (7th Cir.

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[2] Under the Tunney Act, the court, in determining whether a proposed consent agreement is in the public interest, may take testimony, appoint consultants or expert witnesses, or authorize participation by interested persons as amici, intervenors or otherwise. 15 U.S.C 16(f).

1977). Thus, a consent order proceeding under the Commission's Rules 2.31–2.34 does not provide interested persons with any of the procedural rights available in administrative adjudication, such as compulsory process against the Commission or third parties, or the right of intervention. *Bristol Myers Co.* v. *FTC*, 469 F.2d 1116, 1119–1120 (2d Cir. 1972) (Mansfield J. concurring); *Action on Safety and Health et al.* v. *FTC*, 498 F.2d 757 (D.C. Cir. 1974). [8]

To disclose publicly confidential business information obtained from GM and Toyota under the compulsion of Hart-Scott-Rodino, and from other automobile firms under threat of subpoena, would be to grant indirectly to commenters rights of discovery to which they are not directly entitled under the law. Cases like *Bristol Myers* and *Ford, supra,* confirm the informal and non-adjudicative nature of a consent order negotiation, including the public comment period.

This Commission observed nearly two decades ago that, "consent negotiations are not a stage in adjudication but a means of establishing whether adjudication can be avoided altogether. Like investigations, consent negotiations are distinct from the adjudicative process and hence not governed by the standards which control adjudicative procedure." *William H. Rorer Inc.*, 64 F.T.C. 1446, 1447 (1964). Accordingly, the Commission has expressly provided in its rules that the term "adjudicative proceedings" refers to formal proceedings required by statute to be determined on the record after an opportunity for an agency hearing, but "does not include other proceedings such as negotiations for the entry of consent orders * * *." 16 C.F.R. 3.2 (1983). The consent order procedures themselves are set forth in Part 2 of our rules, governing non-adjudicative procedures. 16 C.F.R. 2.31–2.34 (1983). And our adjudicative rules expressly provide that if a consent agreement settlement is proposed while a case is in adjudication, the matter is to be withdrawn from adjudication and treated as being in a non-adjudicative status. 16 C.F.R. 3.25(e) (1983). In the consent [9] order proceeding "there is no examination or cross examination of witnesses, no findings of fact and no conclusions of law." *Bristol Myers, supra* at 1119. Public comment serves to inform the Commission further, which is why the Commission retains the right to withdraw from its provisional agreement in light of new facts or objections brought to its attention. *Ford Motor Co.* v. *FTC, supra, Johnson Products Co.* v. *FTC, supra.* The information disclosed for purposes of public comment under Rule 2.34, therefore, is not information relevant to an adjudication, but a report to the public on the tentative results of the Commission's investigation and tentative settlement that is published under Section 6 of the FTC Act.[3] As reports to the public under Section 6, published documents pertaining to proposed consent agreements are limited by the provisions of Section 6(f), which denies the Commission any authority to make public in such reports trade secrets or commercial or financial information that is privileged and confidential, however obtained. *See* discussion *infra* at 13–17. *See also* Section 21(d)(1)(B) of the FTC Act, 15 U.S.C. 57b–2(d)(1)(B). Such information includes all that "would be likely to cause substantial harm to the competitive position of the person from whom the information was obtained," *National Parks and Conservation Ass'n.* v. *Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974). *See* S. Rep. 96–500, 96th Cong., 1st Sess. 10–12 (1979). **[10]**

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[3] In *Bristol Myers, supra,* Judge Mansfield persuasively rejected the argument that because a final consent order is an adjudicative act, the process leading to it is adjudicative as well. *Accord, Action on Safety and Health* v. *FTC, supra.*

Because the comment period serves simply as a means to supplement the Commission's investigation, the Commission's consent order regulations make no provision whatever for discretionary disclosure of confidential business information obtained under legal compulsion or the threat thereof. They provide only that if an agreement is accepted, the Commission will place the order contained therein on the public record together with an explanation of its provisions and the relief it will offer, "and any other information which it deems helpful in assisting interested persons to understand the terms of the order." 16 C.F.R. 2.34, 3.25(f). After the agreement, order and explanation are published in the *Federal Register,* the Commission undertakes only to "receive and consider any comments or views concerning the order that may be filed by any interested persons." *Id.*

The Commission has historically refrained from making public in consent order proceedings any trade secrets or confidential commercial or financial information obtained from any person. Indeed, when the Commission briefly experimented with the voluntary disclosure of material pertaining to consent order settlements obtained from the investigated party, it expressly confined such disclosures to matter that was routinely available for disclosure under the Freedom of Information Act. It excepted from disclosure all material exempt, from mandatory disclosure under FOIA, particularly "documents which would reveal trade secrets or confidential commercial or financial information, or documents the disclosure of which would interfere with a related **[11]** enforcement proceeding." 42 FR 39658 (1977); 43 FR 3088 (1978).[4]

Against this background, we turn to the specific provisions of the statutes and regulations governing disclosure of confidential business information by the Commission.

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[4] Even this provision for limited disclosure was withdrawn after one year's experience because the segregation of documents into exempt and nonexempt categories resulted in substantial delays in the placing of consent agreements on the public record while documents were segregated into exempt and nonexempt categories. The Commission's experience also demonstrated a lack of public interest in the material being made available. Accordingly, Rules 2.34 and 3.25 were revised to delete the disclosure requirement. 43 FR 51757 (1978).

3. The Hart-Scott-Rodino Act does not authorize the Commission to make public trade secrets and confidential business information in order to enhance the effectiveness of public comment under its consent order regulations.

The premerger notification provisions of the Hart-Scott-Rodino (H-S-R) Act requires parties proposing major transactions subject to Section 7 of the Clayton Act to submit such documentary material and information relevant to a proposed acquisition as is necessary to enable the Commission or the Antitrust Division to determine whether the acquisition, if consummated, would violate the antitrust laws. 15 U.S.C. 18a. Section 7A(h) of that Act, 15 U.S.C. 18a(h), provides that any information or documentary material so submitted "shall be exempt from disclosure [under the Freedom of Information Act], and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding." **[12]**

On its face, this provision does not authorize the disclosure of material required by other statutes or regulations to be kept confidential. Rather, it prescribes a general prohibition against discretionary disclosure of *any* premerger data submitted under H-S-R, without regard to its possibly confidential status under other law. The statute's sweeping prohibition—and only that prohibition—is lifted by the exception clause to the extent that such data actually is used by the Commission in administrative or judicial proceedings.

The process of soliciting and considering public comment on a proposed consent agreement, while not adjudicative in nature, constitutes an administrative action or proceeding under this section. *Cf.*, Cf., 5 U.S.C. 551(13) (defining "agency action" for purposes of the Administrative Procedure Act). Thus information derived from Hart-Scott-Rodino submissions is not barred by Section 7A(h)'s prohibition from disclosure in consent order proceedings under the Commission's Rule 2.34. Nothing in the language of Section 7A(h), or its legislative history,[5] however, indicates that by creating an exception to the statute's bar to disclosure for the purpose of administrative or judicial proceedings, Congress intended to overide other legal bars to disclosure, either directly or by implication. Had Congress intended to repeal or modify existing legal bars to disclosure, or except pre-merger data from subsequently enacted protections **[13]** for confidential business information, it was well aware of how to do so.

Indeed, after the Hart-Scott-Rodino Act was enacted, Congress tightened the restrictions on disclosure of confidential information in the FTC Improvements Act of 1980, 94 Stat. 374, by revising Section 6(f), and by adding the confidentiality provisions now in Section 21, of the Act, 15 U.S.C. 57b-2. There is no evidence to suggest that when it did so it somehow considered pre-merger submissions or consent orders under Section 7 of the Clayton Act to be an exception to the safeguards it was enacting.

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[5] *See* 122 Cong. Rec. H. 6294 (daily ed. Sept. 16, 1974 (Remarks of Ch. Rodino)).

An interpretation of Section 7A(h) permitting disclosure of confidential business information in the context of merger consent orders, notwithstanding other legal barriers, would lead to a complete anomaly. Disclosures in consent order proceedings would be subject to different standards depending on whether they involved a transaction under Section 7 of the Clayton Act or under other provisions of that antitrust laws. For example, a joint venture subject only to the prohibitions in Section 5 of the Act (*e.g.* one not involving an acquisition of stock or assets) would remain subject to other legal prohibitions against disclosure, while those subject to Section 7 of the Clayton Act would not. There is no rational explanation why Congress would want to draw such a distinction or why we should adopt such a bizarre construction of Section 7A(h).[6] [[illegible]]

4. Sections 6(f), 21(d)(1)(B) and Rule 4.10(d) bar disclosure.

The principal statutory prohibitions against disclosure of confidential business information are Sections 6(f) and 21 of the FTC Act, as amended in 1980. 15 U.S.C. 46(f) and 57b–2. Section 6(f) empowers the Commission to make public information the disclosure of which it believes to be in the public interest, but expressly provides "that the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential * * *." Section 21 not only complements this prohibition, but provides in Section 21(e) that "[n]othing in this section shall supersede any statutory provision which expressly prohibits or limits particular disclosures by the Commission * * *."

Under Section 21(b), all material obtained by compulsory process must be given confidential treatment and may be publicly disclosed only with the consent of the submitter. Section 21(c) bars disclosure of material marked confidential not obtained by compulsory process in a law enforcement investigation, unless the Commission determines that the marked material does not fall within the protection of

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[6] For these reasons we cannot accept the mechanical application of the maxim that when two statutes conflict, the specific prevails over the general. Since the exception to the disclosure prohibition in Section 7A(h) applies only to that prohibition, there is no conflict.

It is also significant that the Antitrust Division of the Department of Justice has never construed Section 7A(h) to authorize public disclosure of information subject to prohibitions on disclosure other than those contained in that provision.

Section 6(f), and the Commission provides the submitter 10 days' notice of its intention to disclose. Under [15] Section 21(d)(1)(B), the Commission may disclose the results of any investigation or study it has carried out or prepared, "except that no information shall be identified nor shall information be disclosed in such a manner to disclose" material protected by Section 6(f).

The disclosure of the results of a negotiation for the purpose of public comment on a proposed consent order is governed by Section 21(d)(1)(B). This is so because, as noted above, a consent order proceeding is not an adjudication, and publication of pertinent documents concerning it constitutes "making [information] public" under Section 6. This conclusion is underscored by the contrasting language in Section 21(d)(2), which provides: "any disclosure of relevant and material information *in Commission adjudicative proceedings* or in judicial proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings or by court rules or orders, except that the rules of the Commission shall not be amended in a manner inconsistent with the purpose of this section" (emphasis added). The legislative history of Section 21(d)(2) makes clear that this language refers to the provisions in the Commission's rules providing for the entry of protective orders in on-the-record proceedings before an administrative law judge (16 C.F.R. 3.45) or before a presiding officer conducting an on-the-record proceeding under Section 18 of the FTC Act, 15 U.S.C. 57a (16 C.F.R. 1.18(b)) *See, e.g.*, S. Rep. No. 96–500, 96th Cong., 1st Sess. 27–28 (1979). Congress' restriction of Section 21(d)(2) to "adjudicative" and [16] "judicial" proceedings, and the legislative history cited above clearly indicate that it did not authorize disclosures of confidential business information subject to Section 6(f) in nonadjudicative consent order proceedings.[7] Even in this auspicious year 1984, we cannot agree that when Congress said "adjudicative," it meant "nonadjudicative."

Also relevant to the confidentiality protection provided by Section 21 is Section 21(f), which expresses a congressional policy that material obtained in a law enforcement investigation either by compulsory process or voluntarily in place of such process is not subject to mandatory public disclosure under the Freedom of Information Act. It is within the discretion of agencies, however, to waive FOIA exemptions except to the extent that other statutes, such as Sections 6(f) and 21(b), bar such waiver. As already noted, section 21(b) of the Act provides that information obtained by compulsory process may be publicly disclosed *only* with the consent of the submitter. Information voluntarily submitted to avoid the need for compulsory process, therefore, would have been subject to waiver of the FOIA exemption in Section 21(f) because it was not within the express statutory prohibition in Section 21(b). To encourage voluntary submissions, the Commission intentionally closed the gap between [17] Sections 21(b) and 21(f) by binding itself at 16 C.F.R. 4.10(d) not to disclose voluntary submissions otherwise subject to Section 21(f) and marked confidential, without the submitters' consent. *See* 45 FR 26,284. The Commission must adhere to this regulation while it is in effect. *See e.g., United States ex rel Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954); *United States* v. *Nixon,* 418 U.S. 683, 693–696 (1974); *Pacific Molasses Co.* v. *FTC,* 356 F.2d 386, 387, 389–390 (5th Cir. 1966).

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[7] In this connection, Chrysler purports to quote (Pet. 11–12) the Commission's explanation of its final rules under Section 21 at 46 FR 26,284 (1981). The quotation is incorrect and incomplete. It substitutes the term "administrative proceeding" for the term the Commission actually used: "adjudicative proceedings" and omits the Commission's observation that the legislative history quoted corresponds with prior Commission use of *in camera* orders in "Commission adjudications."

In sum, Section 21(d)(1)(b) expressly bars the disclosure of confidential information subject to Section 6(f) in consent order proceedings because requests for comments in such proceedings are reports under Section 6, not adjudicative actions. Section 21(b) bars the disclosure of material obtained by compulsory process except, per Section 21(d)(2), in Commission adjudicative proceedings under rules providing the submitter an opportunity for *in camera* protection of confidential business information. As pointed out, however, consent order proceedings are not adjudicative proceedings within the meaning of this section. Sections 21(b), 21(f) and Rule 4.10(d) together bar disclosure of material obtained in a law enforcement investigation either by compulsory process, or voluntarily in place of such process that is marked confidential, except by consent of the submitter. These provisions, particularly Rule 4.10(d), apply to almost all of the material submitted by the joint venturers and third parties in the GM-Toyota investigation. Almost all of the material obtained by the Commission from GM, Toyota and the other [18] automobile companies was so marked. It therefore cannot be disclosed.

5. Disclosure is a subject of negotiation in consent order proceedings.

It might be objected that under the above construction of Sections 6, 21 and Rule 4.10(d), the Commission is prohibited from releasing in the context of consent agreement proceedings almost all information obtained in premerger investigations, no matter how trivial, simply because it has been obtained either by compulsory process or, if marked confidential, under threat of compulsory process. This overlooks the essential nature of the consent order process. It is, as already noted, a negotiation for the purpose of avoiding adjudication. The Commission's rules call for "an explanation of the provisions of the [proposed] order and the relief to be obtained thereby, and [release] of any information which it deems helpful in assisting interested persons to understand the terms of the order." 16 C.F.R. 2.34, 3.25(f) (1983). One of the subjects for negotiation contemplated by these rules necessarily is consent to disclosure of information which the Commission is otherwise barred from releasing by Sections 6, 21 and Rule 4.10(d). The object of such negotiations is to provide the Commission with meaningful public comment concerning the proposed consent. Such a negotiation occurred in this case. Disclosure of the memorandum of understanding and related information was a bargaining issue between the Commission's staff and the joint venturers. **[19]**

This negotiating process is what the consent order process is about. As Commissioners Dole and Dixon observed in dissenting from the Commission's experiment briefly making public nonexempt materials pertaining to consent order settlements (42 FR 39659 (1977):

> The negotiations process is by nature delicate; successful negotiations depend in large part upon good faith, give-and-take discussions. Ideas and possible order provisions are discussed by counsel often without the respondents' prior review. Some proposals are rejected and others are accepted in the process of fashioning a consent order which would serve the public interest. Staff advises that respondents' counsel often produce facts which would be hotly contested in litigation.

To impose upon respondents in such negotiations unconsented disclosure of competitively sensitive material that could put at risk the commercial success of the firms involved would place insuperable burdens on the ability of the Commission to obtain consent orders in the public interest. This is particularly important in cases raising complex and difficult competitive issues in which significant remedies can be negotiated without imposing on society the costs of prolonged litigation. The consent order procedure is expressly contemplated by the Administrative Procedure Act, 5 U.S.C. 554(d). Congress left to the agencies the power to develop informal procedures that might be used to achieve consent orders because it recognized "that the formalism of trial-type proceedings might not be conducive to successful settlement negotiations." *Bristol-Myers Co.* v. *FTC, supra,* at 1119. It is therefore hardly surprising that **[20]** disclosure of otherwise confidential material becomes a subject of negotiation.[8]

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[8] The parties to a proposed transaction frequently make public information the Commission cannot initially disclose. General Motors Corporation on February 1, 1984 disclosed the full text of its memorandum of understanding with Toyota in a public filing in Chrysler's antitrust suit against it. Since this action eliminated the formerly confidential status of the redacted portions of the memorandum, we then placed the complete text on the Commission's public record. The substance of the items cited by Chrysler (Pet. 7–8) as having been disclosed in the statement by Chairman Miller and Commissioners Douglas and Calvani were reported in the press before their statement was released on December 22, 1983.

6. Protective orders are unsuited to public comment on consent agreements.

Because consent decree negotiations are not adjudicative proceedings under Section 21(d)(2) of the FTC Act, we cannot agree with Chrysler that Rule 4.10(g) sets at naught all of the safeguards for confidential information reflected in Section 6, Section 21 and Rule 4.10(d). Subsection (g) of Rule 4.10 specifies that material obtained by the Commission may be disclosed in Commission "administrative or court proceedings" subject to appropriate Commission or court protective *in camera* orders, and subject to reasonable prior notice to the submitter affording an opportunity to seek such an order. This rule implements the exception to the other prohibitions in Section 21 embodied in Section 21(d)(2) of the FTC Act. As we have noted, the language and legislative history of that provision limit disclosure under protective orders to "adjudicative proceedings." At most, this includes on-the-record proceedings in Commission adjudications and rulemakings before an administrative law judge or a presiding officer. **[21]**

Moreover, use of protective or *in camera* orders during public comment on consent agreements would be wholly inconsistent with the informal nature and purpose of consent order negotiations, as well as totally impractical. Either the Commission would have to devise a procedure by which each commenter seeking access to confidential information signed a pledge not to disclose it, or the Commission would have to attempt to allow disclosures on the basis of each individual commenter's "interest" in the proceeding. The latter would convert the 60-day comment period into a prolonged litigation over disclosure. The former is completely unfeasible. It would result in broadcast disclosure to an unpredictable number of commenters. Furthermore, the distinction between client and counsel which is essential to safeguard *in camera* disclosures to competitors like Chrysler, could not be maintained. Unlike *in camera* orders in litigation, which can be confined to the litigants' outside counsel, many commenters are not represented by counsel, or if they are, are represented by house counsel or management officials.

In addition, *in camera* disclosures would deter respondents from entering into consent orders, because by doing so they would be subject to an obligation to make much wider disclosure than in an adjudication. If the Commission were to initiate a formal adjudication, the *in camera* order would be limited to complaint counsel and necessary experts, and (insofar as confidential business information of third parties were concerned) to respondents' outside counsel and necessary experts. But if **[22]** "*in camera*" disclosures were used in consent proceedings, then by accepting a consent order respondents would put themselves at the risk of exposing sensitive competitive information to many more persons than in an adjudication.

7. The Commission's "in camera" standard of confidentiality is inapplicable.

Chrysler urges that insofar as confidential information is concerned, the Commission should not apply the standard of Section 6(f) in consent order proceedings, but instead should utilize the criterion applicable for the entry of *in camera* orders in adjudicative proceedings. Although consent orders are not adjudicative, we think it appropriate to address this contention briefly.

In effect, Chrysler urges that under the Commission's decision in *General Foods Corp.*, 96 F.T.C. 168, 169 (1980), Section 6(f) does not bar the disclosure of business data as evidence in consent order proceedings. *General Foods*, however, addressed disclosures in adjudications, not in consent proceedings, and concerned only the standard for *in camera* orders in such cases. Even if Section 6(f) were not applicable, however, the Commission's standard for the entry of protective orders in adjudications would not permit us to make public sensitive confidential business information exacted either from the parties to the joint venture or from third party automobile companies.

The standard for *in camera* orders was originally announced in *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961), in which the Commission held that good cause justifying entry of a protective **[23]** order "requires a showing that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved." *Id.* at 1188. In later cases the Commission ruled that injury under the *Hood* standard occurs only if the documents are (1) secret and (2) material to the applicants business. *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977); *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The showing of competitive injury depends on the materials. In a subsequent order involving *General Foods*, the Commission ruled:

> We do not believe that a showing of serious injury necessarily requires a specific demonstration of the manner in which other firms would use the material to cause competitive disadvantage * * *. Instead, when certain information is found to be materially valuable and secret to a firm's competitive business activities, it is proper for the administrative law judge to infer, without a specific showing of how a competitor would use it, that the loss of the information would seriously affect the possessors' commercial position." *General Foods Corporation*, Docket No. 9085, Order Denying in Part and Remanding in Part General Foods Application for Review entered August 18, 1980 (unpublished).

Significantly, the same approach was adopted in *National Parks and Conservation Association* v. *Morton,* the judicial standard applied under Section 6(f), and in *Touvalareas* v. *The Washington Post Co., supra,* Slip Op. at 29 ("the proponent of confidentiality must show only that the disputed documents contain a given category of confidential information, and that disclosure of that kind of information will harm the proponent's competitive position"). **[24]**

Grounds for the inference of injury are obvious here, and no further showing is required. It is difficult to imagine items of business information more sensitive than the future production and marketing plans, cost and profit data,[9] trade secrets and production technology to which we have had access in our review of this matter. That data constitutes the most significant competitive information possessed by General Motors, Toyota, and the other major automobile companies from which we required information—literally the "corporate jewels" of those firms. Even assuming for argument that there is a difference between the "clearly defined, serious injury" standard of our decision in *Hood,* and the "substantial harm to the competitive position" standard of *National Parks and Conservation Association* v. *Morton,* as incorporated into Section 6(f) by the 1980 Amendments (*see* S. Rep. 96–500, *supra,* at 10–12), under either standard the pricing and other competitively sensitive information we have obtained should not be disclosed.

Conclusion

We emphasize, as we did at the outset, that we do not deal here with trial material necessary to explain an adjudicated Commission decision. Rather, we are concerned with investigatory information obtained under the compulsion of statute, process, or the threat of process that is being used in a consent negotiation **[25]** for the purpose of avoiding adjudication in the public interest. The balance tips much more strongly against disclosure of such materials than if they were used in a trial record that formed the basis for a Commission decision. We have endeavored to achieve disclosure of as much material as we can within the limits of the law. To this end, we have authorized release of our own staff analyses and consultants' reports in redacted form. We have deleted information obtained from the joint venturers and third-party firms that is competitively sensitive, and information marked confidential whose disclosure has not been consented to by the submitters. To the extent that this publication reveals the Commission's own internal deliberative material and attorney work product ordinarily privileged from disclosure, we waive these privileges. We cannot, however, in law or fairness disclose confidential information of others that has been entrusted to us for purposes of our investigation and consent negotiations.

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[9] Such cost data included the pricing formula in the memorandum of understanding that is to determine the price at which GM will purchase joint venture vehicles after the 1985 model year. That formula, however, was subsequently disclosed by GM and is therefore no longer confidential.

Commissioners Pertschuk and Bailey voted in the negative.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I dissent from the Commission's decision to refuse to release more information to the public concerning the GM/Toyota joint venture. I also dissent from the Commission's decision to deny Chrysler's request for an extension of the comment period.

I. *The Commission's Refusal to Release More Information*

It is important for the public to understand the actual legal standard the Commission has adopted concerning release of information in a consent agreement proceeding. The standard applied in releasing some GM/Toyota materials on January 25 and the standard adopted by the majority for all future consent agreement proceedings is that we are *prohibited* from releasing *all* material "obtained in a law enforcement investigation either by compulsory process, or voluntarily in place of such process that is marked confidential, except by consent of the submitter." (Majority Statement at 17) As the majority statement points out, almost all of the material obtained by the Commission from GM, Toyota and the other automobile companies was marked confidential. Since it is typically the case that companies submitting information to the Commission mark most or all of what they submit as "confidential," the standard adopted by the Commission is sweeping indeed. The practical effect of the standard is that essentially *no* information obtained in an investigation not otherwise public can be released, no matter how trivial or how central to the Commission's decision, unless the companies agree.[1]

A good example of the breadth of the majority's standard is the expurgation of a staff discussion about *past* exchanges of information between GM and Toyota that appear highly questionable. (*See* the almost totally expurgated pages at VIII-17-19 of the BC staff memo.) While this information would be useful to the public in understanding how potentially anticompetitive exchanges of information can easily take place in a joint venture setting even if companies exercise good faith, it is inconceivable that revealing this information can cause *commercial, competitive* harm to the companies. I concede it may be embarrassing, but preventing embarrassment is not within our legal mandate.

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[1] This severe limitation on the FTC's discretion was not reflected in Chairman Miller's statement of January 25 when he commented on our release of materials. He stated: "The information required by law to be deleted was confined to only the *most competitively sensitive* data associated with the joint venture." (emphasis added) In fact, the staff followed the standard set out in the majority's statement, which resulted in substantially greater deletions.

The majority's statement attempts to explain away the problem which follows from its legal standard—that companies will control the flow of information to the public in a consent agreement proceeding—by saying that the Commission will negotiate with companies about release of information before a consent agreement is signed. In other words, we would refuse to enter into a consent agreement unless the companies agreed to release of information sufficient to "provide the Commission with meaningful public comment concerning the proposed consent." (Majority Statement at 18) But companies can still dictate limits on disclosure as indicated by what occurred when the staff negotiated the GM/Toyota consent agreement. Until shortly before the meeting to consider the proposed agreement, it was generally understood that the entire Memorandum of Understanding would be released at the time any agreement was made public. Yet when the staff negotiated the agreement, they agreed to a request by GM and Toyota to excise key aspects of the pricing formula—the contract provision most directly relevant to antitrust concerns.

As to the majority's analysis of legal constraints in releasing information, there are two principal flaws. First, even though it is conceded that the Hart-Scott-Rodino Act specifically authorizes release of H-S-R submissions in consent agreement proceedings, the majority argues that the more general prohibitions of Section 21 prohibit release. (Majority Statement at 12)[2] Thus, the majority's reliance on a more general statute nullifies the specific Congressional authorization to release information in Section 7A(h) of the Clayton Act. The second mistake is that the Commission interprets Section 21(d)(2) of the FTC Act and Rule 4.10(g) of our rules to allow release of information submitted in investigations only in adjudicatory proceedings under Part III of our rules and in rulemaking proceedings before an administrative law judge or presiding officer. (Majority Statement at 20) The Commission's past interpretation of those provisions as well as the legislative history of Section 21(d)(2) show that they allow release in consent agreement proceedings as well as adjudicatory opinions.

In order to understand the majority's analysis, it is necessary to review our confidentiality rules, which are hardly models of clarity. The majority's statement sets out the basic scheme and I will not repeat it in detail here except to note certain essential points. Section 21(b) limits release of information submitted pursuant to a subpoena. Most materials at issue here, however, were submitted pursuant to

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[2] Section 7A(h) of the Clayton Act (the Hart-Scott-Rodino provision) provides for release of information "as may be relevant to any administrative . . . proceeding."

H-S-R procedures. Submissions under H-S-R procedures are treated as submitted voluntarily in lieu of subpoenas and, consequently, are exempt from release under the Freedom of Information Act under Section 21(f). Thus, Section 21(f) simply creates an exemption from the FOIA Act; it does not affect our discretionary release of material. Section 6(f) of the FTC Act bars release of "commercial or financial" information which is "privileged or confidential." Finally, the Commission has adopted Rule 4.10(d) which limits our discretion to release information which is submitted in a law enforcement investigation even if not under subpoena.

The principal question in this case is: What provision *bars* release of H-S-R material? As I have argued above, the express authorization in the Hart-Scott-Rodino Act should make the FTC Act irrelevant. But assuming *arguendo* that FTC Act provisions apply, all four provisions to which the majority point—Section 21(b), Section 21(f), Section 6(f), and Rule 4.10(d)—don't bind the Commission's hands to the extent argued by the majority.

The proper interpretation of Section 21(d)(2) and the Commission's Rules of Practice is that they authorize the disclosure of this type of information in administrative proceedings including the formulation of consent orders. Commission Rule 4.10(g) explicitly authorizes the disclosure of material obtained by the Commission in "Commission administrative ... proceedings." The use of the word "administrative" in the rule is a clear indication that the Commission interprets its own statute to permit it to disclose submitted documents in circumstances other than APA adjudications. This interpretation is consistent with the legislative intent of the confidentiality provisions of the FTC Improvements Act.

While Section 21(d)(2) authorizes disclosure in "Commission adjudicative proceedings," that phrase was not intended and should not be construed to be limited to adjudications as defined by the Administrative Procedure Act.[3] Even the General Counsel concludes that it is not so limited, arguing that it includes at least "on-the-record" rulemaking proceedings under Section 18 of the FTC Act. But there is no logical reason to include rulemaking and not consent order proceedings within the scope of Section 21(d)(2). Both are administrative proceedings.[4]

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[3] It is a familiar principle of statutory construction that the same phrase used in different statutes can have different meanings depending on the context. *See, e.g., Goland* v. *CIA*, 607 F.2d 339, 345, n.30 (D.C. Cir 1978), *cert. denied*, 445 U.S. 927 (1980). This is especially true in this case where the term in Section 21(d)(2) ("Commission adjudicative proceeding") is not the same as the term in the APA ("adjudication") and the two statutes have vastly different scopes and purposes.

[4] The General Counsel's description of Section 18 rulemaking as "on-the-record" is clearly wrong. It is informal rulemaking with additional procedural safeguards. It is not "formal" or "on-the-record" rulemaking and therefore not within the APA's definition of adjudication. *See* S. Rep. No. 93-1408, 93d Cong., 2d Sess. 32 (1974) (Conference Report on Magnuson-Moss); *see also Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

A broad construction of Section 21(d)(2) to permit disclosure in consent order proceedings is supported by the legislative history of the Improvements Act. The Senate report on the bill that became the FTC Improvements Act states that Section 21(d)(2) allows the Commission to disclose Section 21 material "in administrative or judicial proceedings." S. Rep. No. 96–500 96th Cong., 1st Sess. 27 (1979). Congressman Preyer, a conferee, also stated:

> The Commission may disclose trade secrets and confidential commercial and financial information in the following circumstances * * * relevant and material information may be disclosed in Commission administrative proceedings or in judicial proceedings, but it may be made subject to appropriate protective orders * * * 126 Cong. Rec. H3870 (May 20, 1980).

See also 126 Cong. Rec. S5678 (May 21, 1980) (Remarks of Senator Ford).

This broader interpretation of Section 21(d)(2) is the one adopted by the Commission in Section 4.10(g) of its Rules of Practice. That rule, which was issued in final form after an opportunity for comment, would be accorded deference by a court as a contemporaneous interpretation by the agency of its own organic statute. *See Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). In explaining its rules, the Commission stated that "under amended Rule 4.10(g) information will not be disclosed in administrative or adjudicatory proceedings without affording the submitter an opportunity to obtain a protective or *in camera* order." 46 FR 26287 (May 12, 1981). Thus, I conclude that Section 21(d)(2) and Rule 4.10(g) both allow the Commission substantial discretion in releasing materials obtained in the course of a Commission investigation when the Commission is explaining to the public why it accepted a consent agreement.

Even though the FTC Act, the Hart-Scott-Rodino Act, and the Commission's rules give us wider discretion than the majority argues, I do not believe the Commission should release all information no matter how sensitive or how unrelated to the relevant issues in a particular proceeding. The Commission, in past cases, particularly the *Hood*[5] and *General Foods*[6] decisions, has adopted a standard which should be applied. These past decisions represent the Commission's recognition that there is some equitable standard which should limit release of information even if not specified in a statute.

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[5] *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Requests for *in camera* treatment must show "that the public disclosure . . . will result in a clearly defined, serious injury to the person or corporation whose records are involved."

[6] *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The showing can be made by showing the documentary material is sufficiently confidential that its release would result in "serious competitive injury." Further, the degree of injury should be balanced against the "importance of the information in explaining the rationale of [Commission] decisions."

II. *Refusal to Extend the Comment Period*

The majority also rejects Chrysler's request for an extension of the 60-day comment period. I disagree for the reasons stated below.

The issue in extending a comment period is whether the public interest in receiving further comment outweighs the parties' understandable desire for the Commission to make its final decision as soon as possible.[7] Here, several factors militate in favor of extending the comment period. The transaction is probably the most significant antitrust matter we have faced during this administration. The matter is complex. Staff recommendations were not unanimous and the Commission was sharply divided on provisional acceptance. The Bureau staff took several months in preparing recommendations, but one of the companies took several months to comply with discovery requests and, in fact, has still not fully complied with the Hart-Scott-Rodino second request. The Commission placed additional material on the public record to aid public comment but not until January 25, when almost half the comment period had run. For all these reasons, I would favor extending the comment period for 30 days.

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[7] The Commission not infrequently grants extension of the comment period. In the last few weeks, for example, the Commission voted to grant an extension of time for comment for an order modification provision and a request for prior approval of a merger pursuant to a Commission order. *Armstrong Cork Co.*, C-1010; *ARA Services, Inc.*, C-2360.

IN THE MATTER OF

BELTONE HEARING AID COMPANY

ORDER TO SET ASIDE IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket 5825. Final Order, Feb. 16, 1956—Order To Set Aside, Feb. 10, 1984

The Final Cease and Desist Order issued against Beltone Hearing Aid Company in Docket 5825 (52 F.T.C. 830 (1956)), has been set aside in light of the Commission's dismissal of the complaint in *Beltone Electronics Corp.* (100 F.T.C. 68 (1982)), which challenged the use of the same exclusive dealing arrangements prohibited by the order in Docket 5825.

ORDER TO SET ASIDE ORDER TO CEASE AND DESIST

On February 16, 1956, the Federal Trade Commission issued an order against Beltone Hearing Aid Company (currently known as Beltone Electronics Corporation) in Docket No. 5825 prohibiting Beltone, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements upon its dealers. [52 F.T.C. 830]

However, on July 16, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.,* Docket No. 8929 challenging, among other things, Beltone's use of the same exclusive dealing arrangements prohibited by the order in Docket No. 5825. [100 F.T.C. 68]

On December 7, 1983, the Commission pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Beltone an order to show cause why the proceeding herein should not be reopened to set aside the final cease and desist order in Docket No. 5825, prohibiting Respondent's use of exclusive dealing arrangements. Respondent was provided an opportunity to object to the proposed set aside of the order against it, and having failed to do so, is now deemed to have consented to such action. In view of the Commission decision in *Beltone,* the Commission believes that this set aside is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that the order herein shall be set aside as of the effective date of this order.

IN THE MATTER OF

SCHLUMBERGER, LTD., ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9164. Complaint, Jan. 28, 1983—Dismissal Order, Feb. 17, 1984

On Feb. 17, 1984, the Federal Trade Commission issued an order dismissing the complaint against Schlumberger, Ltd., citing "changed circumstances since the issuance of the Commission's complaint."

Appearances

For the Commission: *George Cary.*

For the respondents: *Werner L. Polak, Shearman & Sterling,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the acquisition by Schlumberger, Ltd. ("Schlumberger") of Accutest Corporation ("Accutest") violates Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. *Definitions*

1. For the purposes of this Complaint, the following definitions shall apply:

a. *Digital integrated circuit automatic test equipment* (*DIC/ATE*) means a computer controlled test system, the basic functions of which are to ascertain the operating characteristics of digital integrated circuits and to determine if those characteristics are within allowable limits. The uses of DIC/ATE are design engineering characterization, product engineering, incoming inspection, production testing and quality assurance of digital integrated circuits.

b. *Large scale integration and very large scale integration digital integrated circuit automatic test equipment* (*LSI/VLSI ATE*) means a computer controlled test system, the basic functions of which are to ascertain the operating characteristics of large scale integration or very large scale integration digital integrated circuits designed to perform logic or microprocessor functions and to determine if those characteristics are within allowable limits. The uses of LSI/VLSI ATE are design engineering characterization, product engineering, incoming inspection, production testing, and quality assurance of large scale integration and very large scale integration digital integrated circuits designed to perform a logic or microprocessor function.

c. *Memory integrated circuit automatic test equipment* (*memory IC/ATE*) means a computer controlled test system, the basic functions of which are to ascertain the operating characteristics of digital integrated circuits designed to perform memory functions and to determine if those characteristics are within allowable limits. The basic uses of memory DIC/ATE are design engineering characterization, product engineering, incoming inspection, production testing, and quality assurance of digital integrated circuits designed to perform a memory function.

II. *Schlumberger, Ltd.*

2. Schlumberger is a Dutch Antilles Corporation headquartered in New York and Paris.

III. *Fairchild Camera and Instrument Corporation*

3. Fairchild is a Delaware corporation, with headquarters in Mountain View, California. In 1979, Fairchild was acquired by Schlumberger and Fairchild has been since that time and is now a wholly owned subsidiary of Schlumberger.

IV. *Accutest Corporation*

4. Accutest Corporation is a Massachusetts corporation, with its headquarters in Chelmsford, Massachusetts. In 1982, Accutest was acquired by Fairchild and Accutest has been since that time and is now a wholly-owned subsidiary of Fairchild.

V. *Jurisdiction*

5. At all times relevant herein, each of the companies named in this complaint have been engaged in or affected commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act as amended, 15 U.S.C. 44.

VI. *The Acquisition*

6. On October 22, 1982 Schlumberger acquired Accutest in a cash transaction and subsequently merged it into one of its own wholly-owned subsidiaries.

VII. *Trade and Commerce*

7. The relevant product markets are the following:

(a) the production or sale of DIC/ATE;
(b) the production or sale of memory IC/ATE; and
(c) the production or sale of LSI/VLSI ATE.

8. The relevant geographic markets are the United States and the world.

9. Concentration in each of the relevant product and geographic markets is high.

10. Barriers to entry into the manufacture and sale of each of the relevant products are substantial.

11. Both Fairchild and Accutest are substantial competitors in each of the relevant product markets.

VIII. *Effects of the Acquisition*

12. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) Substantial actual competition between Fairchild and Accutest will be eliminated;

(b) Substantial potential competition between Fairchild and Accutest will be eliminated;

(c) Substantial actual competition between Accutest and other companies engaged in the production or sale of relevant products will be eliminated;

(d) Substantial potential competition between Accutest and other companies engaged in the production or sale of relevant products will be eliminated;

(e) The elimination of Accutest as a substantial technological innovator;

(f) The elimination of the potential future expansion of Accutest in the markets in which it currently competes;

(g) Fairchild, as the dominant firm in the relevant markets, will be further strengthened and entrenched at the expense of its competitors;

(h) The already high levels of industry concentration in the relevant markets will be significantly increased; and

(i) Barriers to entry in the relevant markets will be significantly raised.

IX. *Violations Charged*

The acquisition constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

ORDER

The respondents in this matter have moved to dismiss the complaint on the grounds of changed circumstances since the issuance of the Commission's complaint. Complaint counsel do not oppose the motion. The motion is granted and the complaint in this matter is dismissed.

It is so ordered.

Commissioner Pertschuk dissented.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I agree that Schlumberger's divestiture of Accutest adequately resolves the immediate antitrust problem involved in this proceeding. However, I cannot support the Commission's decision to dismiss the complaint because it leaves unresolved the important question of the need for a prospective order subjecting future acquisitions by Schlumberger to the prior approval of the Commission.

The administrative law judge, the parties, and the Commission have decided that in light of the Accutest divestiture further litigation over the sole issue of prospective relief would be an unjustified expenditure of resources. As I understand the law, this is not the correct test for deciding whether an order is justified. That test is whether, regardless of abandonment of the alleged unlawful conduct during the course of litigation, there is a "cognizable danger of recurrence" of similarly unlawful behavior by the respondent in the future. *United States v. W. T. Grant, Co.*, 345 U.S. 629 (1953). Moreover, in deciding whether further litigation here is necessary, we must consider the value of the Commission's well-established policy favoring fencing-in orders in merger cases. In merger cases specifically, the Commission has recognized that "prophylactic relief, not merely the after-the-fact remedy of divestiture, is essential if the Congressional policy expressed in Section 7 of the Clayton Act is to be effectively carried out. . . ." *Beatrice Foods Co.*, 68 F.T.C. 1003, 1006 (1965). Such relief deters illegal behavior not only by the respondent in the case at hand but other firms as well, thus serving broad law enforcement objectives. Until and unless the Commission can reasonably conclude on the basis of the record in this proceeding that Schlumberger is unlikely to make any similarly suspect acquisitions in the future, this case is not moot and should be continued in the public interest.

Though agreeing to Schlumberger's motion to dismiss, complaint counsel actually have made a powerful case for continuing this litigation to consider the necessity for a prospective remedy. They have argued that:

> A ten year ban is particularly appropriate in this case for three reasons. First, Schlumberger/Fairchild have a proclivity for expanding their presence in the ATE industry through acquisition, having made six acquisitions in the overall industry and four in the particular markets alleged in the Complaint. Second, in reporting the acquisition of Accutest pursuant to the Hart-Scott-Rodino Act's Premerger Notification Form, Schlumberger reported its sales of semiconductor test equipment under a standard industrial classification code number not found in Bureau of Census publications. A ten year prior approval requirement would reduce the likelihood that any future acquisitions would be consummated prior to full Commission review. Finally, even if the requirements of the H-S-R Act are adhered to, because of the extremely high technology involved in these markets, acquisitions not reportable under the Hart-Scott-Rodino Premerger Act may be competitively quite significant if they involve small firms that are technological innovators. Complaint Counsel's Assent to Respondents' Motions to Dismiss, Sept. 13, 1983, at 3.

After chronicling these cogent reasons favoring litigation over the issue of "prior approval," complaint counsel lamely recommend dismissal of the complaint because "litigation of this matter will require the expenditure of significant resources. . . ." not warranted "solely to achieve a ten year merger ban." This conclusion, adopted by the Commission, is difficult to understand. If a prior approval requirement seems "particularly appropriate" at this juncture of the case to protect the public against possible anticompetitive acquisitions by Schlumberger in the future, then the Commission is duty-bound to pursue it, even if that means more litigation.

The majority's decision to dismiss the complaint, particularly in circumstances where a prospective order may well be appropriate, is flatly inconsistent with the Commission's policy of insisting on prior approval provisions where necessary in merger cases. That policy recognizes that prior approval provisions serve both as an efficient fencing-in measure against repetitions of unlawful conduct by the same firm and as a deterrent against possibly illegal mergers by other firms. Until this case at least, prior approval had remained an important remedial tool in merger law enforcement. Indeed, past Commission merger orders have invariably had prior approval provisions.

Moreover, just last year the Commission turned down a respondent's request for the complete elimination of a prior approval provision from an outstanding order. *Damon Corp.*, C-2916 (March 29, 1983). [101 F.T.C. 689]

It is sometimes argued that the Hart-Scott-Rodino Act reporting requirements obviate the need for prior approval provisions in Commission orders. But the Hart-Scott-Rodino Act is just that, a reporting act, not an approval requirement. The Act's reporting requirements neither reach nor prevent all anticompetitive acquisitions. The reporting party can consummate the acquisition unless the Commission takes *affirmative* legal action to prevent it, and if the acquisition does go forward, expensive litigation is necessary to "unscramble" it. Further, as the H-S-R misreporting episode in this very case showed, the Act does not guarantee that the Commission will automatically uncover all anticompetitive overlaps even when an acquisition is reported. Until today, the Commission's consistent policy of including prior approval clauses in merger orders has been a clear indication that the Commission has not felt that Hart-Scott-Rodino offers perfect or even sufficient protection.

The message that today's decision sends to aggressive firms is that they can gamble fairly painlessly in entering into mergers and acquisitions of dubious legality under the Clayton and FTC Acts. If sued by the Commission—itself a rather remote prospect in the current administration—they can extricate themselves from a sticky legal situation through simple divestiture and move on, scot-free, to their next legally risky acquisition. Moreover, it would not be surprising if this decision precipitated an avalanche of petitions for relief from prior approval provisions from companies presently under FTC merger orders. The time and resources consumed by these appeals—not to mention the cost to the public—will, I suspect, end up being far greater than the relatively small expense of continuing this litigation over the question of whether to impose a prior approval requirement on Schlumberger.

IN THE MATTER OF

CENTURION INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE MAGNUSON-MOSS WARRANTY—FEDERAL TRADE COMMISSION IMPROVEMENT ACT

Docket C-3131. Complaint, Feb. 22, 1984—Decision, Feb. 22, 1984

This consent order requires three Texas manufacturers-sellers of mobile homes and related services, among other things, to timely honor and fully satisfy valid warranty and service contract claims. The order prohibits respondents from disclaiming any implied warranties; excluding in any warranty or service contract incidental or consequential damages arising from any consumer injury without disclosing that some states do not allow for such exclusions; failing to disclose in their warranties that certain states may provide legal rights beyond those contained in the warranty; and failing to include in their warranties procedures a consumer must follow in order to obtain performance on warranty obligations. Additionally, respondents must provide consumer redress to those persons who were entitled to but did not receive performance under a warranty or service contract issued or sold by the companies, or under a warranty implied by state law.

Appearances

For the Commission: *George E. Schulman* and *Paul M. Updegrove.*

For the respondents: *A. Stephen Hut, Jr.* and *Leslie C. Seeman, Wilmer, Cutler & Pickering,* Washington, D.C. and *Frank D. Thomas, Jr.,* in-house counsel, Waco, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Centurion International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas.

Respondent Centurion Homes Corporation, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas.

Respondent Centurion Homes of California, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas.

All of the above respondents have their principal offices and places of business at 901 West Loop 340, Waco, Texas.

In addition, respondents operated through two other corporations that are now defunct: Tri-Star Service Company, Inc., which was a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, and Centurion Homes Corporation of Arizona, Inc., which was a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona.

The aforementioned respondents cooperate and act, and, until February 1, 1982, the aforementioned respondents and the two defunct corporations cooperated and acted, together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, and, until February 1, 1982, respondents and the two defunct corporations were, engaged in the manufacture, offering for sale, sale and distribution of mobile homes, service contracts, and related goods and services. Respondents generally sell their products to the public through independent mobile home dealers. Said mobile homes are "consumer products" and the ultimate purchasers of said mobile homes are "consumers" as those terms are defined by Section 101 (1) and (3) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301 (1) and (3).

PAR. 3. Respondents provide, and have provided, written warranties with the mobile homes described in Paragraph Two, herein, as "written warranty" is defined in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301(6). Said written warranties promise, *inter alia,* that for one year from the date of delivery of the mobile home to the original purchaser, respondents will repair, without charge, all defects in material and workmanship arising under normal use of the mobile home.

PAR. 4. Respondents and the defunct corporations have sold, for an additional fee, service contracts, as "service contract" is defined in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301(8). Said service contracts promise, *inter alia,* that for five years after the date of delivery of the mobile home the promisor will repair, without charge, all manufacturing defects in material and workmanship under normal use, except as may otherwise be set forth in the service contract.

PAR. 5. Respondents maintain, and have maintained, a substantial course of business, including the acts and practices hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the offering for sale and sale of merchandise and services of the same general kind and nature as the merchandise and services sold by respondents.

Count I - Violations of Section 5

Alleging a violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One to Six are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. In the course and conduct of their business as aforesaid, and at all times material herein, respondents now represent, and have represented, directly and by implication, both to potential purchasers and to purchasers of their mobile homes, that all of the respondents and the two defunct corporations described herein are a single corporate entity. For example, they have caused advertising and promotional materials to refer to these respondents by common names such as "Centurion", "Centurion Homes", or "Centurion Homes Corporation" or by using a common logo, rather than by their correct legal names. In addition, they have caused warranties issued by the various respondents uniformly to identify the warrantor as "Centurion" or "Centurion Homes" rather than by the name of any of the particular individual corporations.

PAR. 8. In the course and conduct of their business as aforesaid, on numerous occasions, respondents and the two defunct corporations have failed to observe the corporate formalities between and among each other. For example, they have transferred assets from each other without paying fair market value for those assets and they have paid for liabilities incurred by each other.

PAR. 9. None of the respondents has ever been formally dissolved as a corporation, been adjudicated bankrupt or had its debts discharged in a bankruptcy or insolvency proceeding. The two defunct corporations surrendered their corporate charters after the occurrence of the acts and practices alleged herein.

PAR. 10. On numerous occasions, respondents and the two defunct corporations have failed to honor their obligations or have otherwise disclaimed valid claims arising under the warranties and service contracts they have issued. Such occasions include, but are not limited to, the following:

a. Respondents terminated the manufacture of mobile homes at certain manufacturing facilities. For example, respondents terminated the manufacture of mobile homes at Centurion Homes of California, Inc. Thereafter, on numerous occasions, respondents failed to honor or otherwise disclaimed valid warranty claims concerning mobile homes manufactured at the terminated facilities on the grounds that the said manufacturing operations are no longer in business and without assets. On some occasions, respondents represented, directly and indirectly, to consumers with valid warranty claims, that respondents were no longer legally obligated to honor the warranties they had issued.

b. Respondents terminated all operations at Tri-Star Service Company, Inc. Tri-Star had issued service contracts which provided that for five years after the date of delivery of the mobile home the promisor would repair, without charge, all manufacturing defects in material and workmanship under normal use, except as may otherwise be set forth in the service contract. Thereafter, on numerous occasions, all prior to the time Tri-Star Service Company, Inc., became defunct, respondents failed to honor or otherwise disclaimed valid service contract claims based on service contracts sold by the Tri-Star Service Company, Inc., on the grounds that said company is no longer in business and without assets. On some occasions, respondents represented, directly and indirectly, to consumers with valid service contract claims, that respondents were no longer legally obligated to honor the service contracts they had sold.

PAR. 11. Respondents' failure to honor their warranties and service contracts was and is an unfair act or practice. Respondents' representations that they were not legally obligated to honor their warranty or service contract obligations because of the termination of certain operations was and is false, misleading, deceptive and an unfair act or practice.

PAR. 12. The use by respondents of the aforesaid false, misleading, deceptive and unfair representations, directly or by implication, has had and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that the representations were and are true and complete, and that the acts and practices were fair, and into the loss or waiver of valuable warranty and service contract rights by reason of said erroneous and mistaken belief.

PAR. 13. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Count II - Violations of Warranty Disclosure Rules

Alleging violation of Section 5 of the Federal Trade Commission Act by violation of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, and of the regulations promulgated thereunder, the allegations of Paragraphs One to Six are incorporated by reference herein as if fully set forth verbatim.

PAR. 14. Respondents' written warranties violate the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301 *et seq.*, by disclaiming implied warranties by stating that there are no warranties except those on the face of the written warranty. Such a disclaimer of implied warranties is a violation of Section 108(a) of the Warranty Act, 15 U.S.C. 2308(a), which provides that implied warranties may not be disclaimed for at least the period of time during which the written warranty is in effect. Therefore, pursuant to Section 110(b) of the Warranty Act, 15 U.S.C. 2310(b), respondents' disclaimer of implied warranties is a violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 15. Respondents' written warranties violate the Commission's Rule concerning Disclosure of Written Consumer Product Warranty Terms and Conditions ("Warranty Disclosure Rule"), promulgated under the Warranty Act, 16 C.F.R. 701. Examples of such violations include, but are not limited to, the following:

a. Respondents' written warranties exclude incidental and consequential damages without disclosing that some states do not allow such exclusions. The failure to provide such a disclosure is a violation of Section 701.3(a)(8) of the Warranty Disclosure Rule and, therefore, according to Section 110(b) of the Warranty Act, 15 U.S.C. 2310(b), is an unfair or deceptive act or practice and an unfair method of competition in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

b. Respondents' written warranties do not disclose that certain states also may give legal rights in addition to those provided in the written warranty. The failure to provide such a disclosure is a violation of Section 701.3(a)(9) of the Warranty Disclosure Rule and, therefore, according to Section 110(b) of the Warranty Act, 15 U.S.C. 2310(b), is an unfair or deceptive act or practice and an unfair method of competition in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

c. Respondents' written warranties do not provide a clear and concise step-by-step procedure for the consumer to follow in order to obtain performance of any warranty obligation. For example, said warranties do not provide the name and mailing address of the warrantor and/or the name and mailing address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number that consumers may use without charge to obtain information on warranty performance. Further, said warranties do not state what notice is required to obtain warranty service. The failure to provide a clear step-by-step procedure to obtain performance of warranty obligations is a violation of Section 701.3(a)(5) of the Warranty Disclosure Rule and, therefore, according to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice and an unfair method of competition in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 16. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition and unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act. The acts and practices of respondents will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Commission staff proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such an agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Centurion International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 901 West Loop 340, in the City of Waco, State of Texas.

Respondent Centurion Homes Corporation, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 901 West Loop 340, in the City of Waco, State of Texas.

Respondent Centurion Homes of California, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 901 West Loop 340, in the City of Waco, State of Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act"), 15 U.S.C. 2301, and in Section 701.1 of the Commission's Rule concerning Disclosure of Written Consumer Product Warranty Terms and Conditions ("Warranty Disclosure Rule"), 16 C.F.R. 701, promulgated by the Commission under the Warranty Act, and the definition of "commerce" pursuant to Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall apply to this order.

I

It is ordered, That respondents Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, their successors and assigns, and their officers, employees, agents and representatives, directly or through any corporation, subsidiary, division or other device, in connection with the issuance of any written warranty or service contract for any mobile home or recreational vehicle or any component part thereof in or affecting commerce, do forthwith cease and desist from failing to honor and satisfy fully, within a reasonable period of time after receiving from the consumer a request for such satisfaction, any valid claim arising under such warranty or contract, *provided* that within that period of time the consumer has allowed a reasonable number of attempts at satisfying the claim.

II

It is further ordered, That respondents Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, their successors and assigns, and their officers, employees, agents and representatives, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale and distribution of any mobile home or recreational vehicle or any component part thereof in or affecting commerce, do forthwith cease and desist from:

A. Disclaiming or modifying in any warranty or service contract any implied warranty, except as provided by Section 108 of the Warranty Act, 15 U.S.C. 2308;

B. Excluding in any warranty or service contract any incidental or consequential damages arising from any consumer injury without clearly and conspicuously disclosing, as provided by Section 701.3(a)(8) of the Warranty Disclosure Rule, that some states do not allow for such exclusion;

C. Failing in any warranty to disclose, as provided by Section 701.3(a)(9) of the Warranty Disclosure Rule, that certain states may give the consumer legal rights in addition to those provided by the warranty;

D. Failing in any warranty to state, as provided by Section 701.3(a)(5) of the Warranty Disclosure Rule, clearly, prominently, and concisely a step-by-step explanation of the procedure that the consumer should follow in order to obtain performance of the warranty obligation; and

E. Violating any other provision of the Warranty Act, 15 U.S.C. 2301 *et seq.*, or of the Warranty Disclosure Rule, 16 C.F.R. 701.

III

It is further ordered, That respondents Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, their successors and assigns, and their officers, employees, agents or representatives shall provide consumer redress in accordance with the provisions of this Part to those consumers who were entitled to but did not receive performance under a warranty or service contract issued or sold by respondents or under a warranty implied by state law by:

A. *Identification of Consumers*

1. Prior to the date of mailing pursuant to paragraph III(B), taking all reasonable steps to compile lists of:

a. the name and current address of every person who purchased a new mobile home manufactured by CHC of California from January 1, 1979, until the date of service of this order;

b. the name and current address of every person who purchased a new mobile home manufactured by CHC of Arizona; and

c. the name and current address of every person who ever purchased a service contract from respondents or the defunct corporations and every person who is the current owner of a service contract issued by respondents or the defunct corporations if the service contract permitted transfer of ownership;

2. Such lists to be compiled:

a. from respondents' files, including records required by the Department of Housing and Urban Development;

b. from requests to the state mobile home regulatory agencies in the states of Arizona, California, Texas and New Mexico;

c. from solicitations to the mobile home dealers who sold Centurion mobile homes and related service contracts;

d. from the records of Federal Trade Commission; and

3. If by the thirtieth day prior to the date of mailing pursuant to paragraph III(B) such lists do not contain the names and current addresses of at least 80% of said persons, including at least 70% of the original owners and 70% of the purchasers of service contracts, employing an independent commercial locater service to compile the lists prior to the date of mailing pursuant to paragraph III(B) and in that regard to provide all reasonable assistance to that locater service.

B. *Notification of Persons*

Sending, by postage-paid first class mail, within sixty days of the date of service of this order, to all persons identified pursuant to Paragraph A, above:

1. in the case of purchasers of mobile homes, a letter substantially identical to Appendix A and a claim form substantially identical to Appendix D; and/or
2. in the case of purchasers or transferees of service contracts, a letter substantially identical to Appendix B and a claim form substantially identical to Appendix E;

C. *Notification Upon Receipt of Claim Forms*

For each person who returns a claim form within forty-five days from the date of such mailing, sending within thirty days of the receipt of that claim form a notice of whether they will honor the claim and perform the work or reimburse the costs incurred by consumers as a result of respondents' failure to perform under a warranty, service contract or implied warranty.

D. *Performance of Work or Payment of Claim*

Performing the requested warranty or service contract work or paying the claim for reimbursement or diminution of value (unless the claim is denied pursuant to Paragraph E, below):

1. if, with respect to a warranty claim, the claim relates to defects in material and workmanship under normal use and service that arose within one year from the date of delivery of the mobile home and the consumer gave to respondents or their successors and assigns such notification of the defect as required by the warranty; or
2. if, with respect to a service contract claim, the claim relates to defects covered by the service contract; or
3. if, with regard to an implied warranty claim, the consumer gave to respondents or their successors and assigns such notice as is reasonably required under applicable state law.

The phrase "notification of the defect as required by the warranty" includes written or telephonic notice of any alleged defect to the respondents, the selling mobile home dealer or a state mobile home agency. If notification was not given, it is not required if the consumer submits a sworn statement that the reason for not providing notice was the actual or impending closing of the manufacturing plant. If the consumer is relying upon an implied warranty notification of the defect is required only to the extent reasonably required under applicable state law.

If a person seeks reimbursement for costs or, if the defect cannot reasonably be repaired, for diminution of value, respondents or their successors and assigns may require reasonable proof of the claim by such means as cancelled checks, paid invoices, or professional appraisals. As used herein, reimbursement of costs includes payment for diminution of value if the defect cannot reasonably be repaired. The defect cannot reasonably be repaired if, for example, the original owner no longer owns the mobile home. In such case, respondents or their successors and assigns must pay such owner for diminution of value.

Payment for diminution of value shall include the reasonable cost of any professional appraisal or estimate.

All reimbursements for costs, diminution of value and/or all repairs shall be made and completed within 60 days of the date the consumer is notified of the decision to make the repairs or within 60 days of an arbitration award ordering repairs to be made, except that:

(1) all such repairs to mobile homes located outside of the states of California, Arizona, New Mexico, or Texas; and

(2) all such repairs to mobile homes located in inaccessible locations (defined as more than half a mile from the nearest improved or unimproved road);

shall be performed within 90 days of the date that the consumer is notified pursuant to Paragraph C of this part that they will make the requested repairs or within 90 days of the date of an arbitration award ordering repairs to be made.

All such repairs to mobile homes where respondents or their successors and assigns are unable to obtain parts and materials within 60 days of the date of notification because said parts and materials are no longer in use by respondents or their successors and assigns shall be performed within 90 days of the date that the consumer is notified pursuant to Paragraph C of this part that respondents or their successors and assigns will make the requested repairs or within 90 days of the date of an arbitration award ordering repairs to be made. In such case respondents or their successors and assigns must notify the consumer of their inability to obtain the parts and the expected date the repairs will be made.

Conditions providing for excuse of the timely performance by the respondents or their successors and assigns as otherwise provided in this Part are as follows:

1. Natural disasters;
2. Acts of God or governmental authorities;
3. Strikes;

4. Public unrest;

5. Adverse weather conditions that would make it extremely difficult to repair the mobile home;

6. Inability to contact the mobile home owner to arrange repairs for the mobile home in question despite diligent efforts by respondents to make such contact where such inability is occasioned by the absence of the consumer from the mobile home; or

7. Absence of the consumer from the mobile home at the specific time agreed upon by the respondents and said purchaser for the scheduled service upon the mobile home but consumers need not agree to a time less specific than a half day time period (*i.e.*, morning or afternoon) in which to make the scheduled service.

E. *Denial of Claims*

Respondents or their successors and assigns may deny any claims (in whole or in part) for performance or reimbursement submitted pursuant to this Part if they have a reasonable, good faith belief that they are not responsible for performance or reimbursement as claimed under the applicable warranty, service contract or warranty implied under state law; or if the claimant does not submit reasonable proof of notification or of loss as set forth in the attached letters. In such case respondents or their successors and assigns shall send written notice giving the reasons for any denial to the claimant within thirty days from receipt of the claim. Such notice shall be substantially identical to the attached Appendix C and shall be sent by postage pre-paid, first class mail.

Furthermore, if respondents or their successors and assigns deny in whole or in part any request for warranty or service contract performance or reimbursement of costs they must:

1. Afford the consumer the right to submit such denial to an impartial mediation and arbitration procedure, entailing no mandatory administrative cost or filing fee to the consumer, which mediation and arbitration procedures will be conducted by the Better Business Bureau in accordance with their mediation and arbitration procedures.

2. Comply within the time periods in this Part with and abide by any negotiated agreement or arbitration award issued by the Better Business Bureau. Arbitration awards issued pursuant to this order shall not be binding on the consumer unless the consumer accepts the award in full satisfaction of his or her claim for warranty or service contract performance or reimbursement of costs.

IV

It is further ordered, That respondents Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, their successors and assigns, and their officers, employees, agents and representatives, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale and distribution of any mobile home or recreational vehicle or any component part thereof in or affecting commerce, shall maintain and upon reasonable request and during regular business hours make available to the Federal Trade Commission for inspection and copying a legible and completed copy of each different type or form of warranty and service contract and of each advertisement or promotional material therefor, of every claim submitted to respondents or their successors and assigns by consumers in connection therewith, and of all correspondence relating thereto, *provided, however,* that no document need be maintained for more than four years after the document was prepared or last used, whichever period is longer.

V

It is further ordered, That respondents shall distribute a copy of this order to all their operating divisions and all present or future personnel, agents, or representatives having responsibility or authority to establish company policies, including but not limited to policies concerning warranty service, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

VI

It is further ordered, That respondents shall notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations that may affect compliance obligations arising out of the order.

VII

It is further ordered, That respondents shall, within nine months after service of this order, file with the Commission a report in writing setting forth in detail the manner and form in which respondents have complied with this order.

APPENDIX A

Dear Centurion Mobile Home Owner:

You may still have certain legal rights to have defects in your mobile home repaired for free. You may also be entitled to be reimbursed for money you spent repairing your mobile home or for the decrease in value of your mobile home due to the company's failure to repair. You may be entitled to reimbursement even if you no longer own the home.

You may be eligible for such service or reimbursement if you are the original owner of a Centurion Mobile Home. You are eligible if during your first year of ownership you experienced problems that were covered by the warranty you received from Centurion and (1) you complained about the problem to the manufacturer or the dealer or the state mobile home agency or some other government agency or (2) you did not complain because you were informed that the manufacturer's plant was closed or about to be closed.

You can be reimbursed for those expenses you incurred by having to repair mobile home defects yourself, by having to hire someone else to repair the defects, by the amount of the costs to repair the home or by the diminished value of the mobile home because you are not able to repair the defects at all. Reimbursement for the amount of the costs to repair the mobile home or for the diminished value must be based on cancelled checks, receipts or a professional estimate; the cost of such estimate is also reimbursable. Please include with your claim a copy of the check, receipt or estimate on which you are relying.

If you think you may be eligible, please complete the enclosed form and mail it to Centurion at the address on the letterhead within *45 days from the date of this letter.*

Centurion will notify you within thirty days after receiving your letter whether we will honor your claim. If the company disputes any part of your claim, we will tell you why it is disputing the claim and will explain how you may appeal that dispute to an independent, free arbitrator.

For your information, we are attaching a description of what is and what is not covered by the warranty.

This letter is being written because of an agreement between Centurion and the Federal Trade Commission. If you have any comments or complaints about how well Centurion is responding to your complaint, let the Federal Trade Commission know at this address:

Federal Trade Commission
Division of Enforcement
Bureau of Consumer Protection
Washington, D.C. 20580

Very truly yours,
[Centurion Office Name]

CENTURION MOBILE HOME WARRANTY

The warranty covers: Centurion will repair or replace, free of charge, including any related installation costs, any defective part.

The warranty does not cover: The Warranty does not apply to ranges, refrigerators, radios, air conditioners, water heaters, washers, dryers, furnaces, bedding or articles of furniture or furnishings which are warranted by their respective manufacturer.

The warranty also does not apply to any defect, malfunction, failure of the mobile home or one of the appliances or furnishings therein caused by misuse, neglect, accident, improper loading during secondary moves made by the original purchaser, failure to comply with the homeowner's manual instructions, or unauthorized repairs or alterations unless such repairs or alterations were made after being unable to secure warranty service from Centurion or the mobile home dealer, or damage not resulting from defect or malfunction while the product is in the possession of purchaser, or unreasonable use including a failure to provide reasonable and necessary maintenance will void this warranty. Provided, however, that repairs or alterations made by the manufacturer of appliances or equipment under the terms of their respective warranties shall not be considered as unauthorized repairs or alterations under the terms of this warranty.

APPENDIX B

Dear Tri-Star Service Company Extended Service Contract Holder:

You may still have certain legal rights to have defects in your mobile home repaired for free under your Tri-Star Extended Service Contract. You may also be entitled to be reimbursed for money spent repairing your mobile home yourself, for having to hire someone else to repair the defects, for the costs to repair the home or for the decrease in value of your mobile home due to the company's failure to repair if the defects cannot be repaired at all. You may be entitled to reimbursement even if you no longer own the home. Reimbursement for the costs to repair the mobile home or for the diminished value must be based on a professional estimate; the cost of such estimate is also reimbursable.

You may be eligible for such service or reimbursement if you own a mobile home with a Tri-Star Extended Service Contract that is still valid or if while the service contract was valid you experienced problems covered by the extended service contract. Also, to be eligible you must have complained about the problem to either Tri-Star Service Company or the dealer or the state mobile home agency or some other government agency. You don't need to have complained if you were informed that Tri-Star was not in business or about to go out of business.

You can be reimbursed for those expenses you incurred by having to repair mobile home defects yourself, having to hire someone else to repair the defects, by the amount of the cost to repair the home or by the diminished value of the mobile home because you are not able to repair the defects at all. Reimbursement for the amount of the cost to repair the mobile home or for the diminished value must be based on cancelled checks, receipts or a professional estimate; the cost of such estimate is also reimbursable. Please include with your claim a copy of the check, receipt or estimate on which you are relying.

If you think you may be eligible, please complete the enclosed form and mail it to Centurion at the address on the letterhead *within 45 days from the date of this letter.*

Centurion will notify you within thirty days of the date of receipt of your letter whether it will honor your claim. If it disputes any part of your claim, it will tell you why it is disputing the claim and will explain how you may appeal that dispute to an independent, free arbitrator.

For your information, we are attaching a description of what is and what is not covered by your Tri-Star Service Contract.

This letter is being written because of an agreement between Centurion and the

Federal Trade Commission. Tri-Star is now defunct, but was a corporate subsidiary of Centurion. If you have any comments or complaints about how well Centurion is responding to your complaint, let the Federal Trade Commission know at this address:

Federal Trade Commission
Division of Enforcement
Bureau of Consumer Protection
Washington, D.C. 20580

Very truly yours,
[Centurion Office Name]

TRI-STAR SERVICE CONTRACT

Your Service Contract covers: Any manufacturing defect in material or workmanship.
Your Service Contract does not cover:

a. Tires, bedding, draperies, furniture and carpeting.

b. Washing machines, dryers, dishwashers and air conditioners.

c. Any defect, malfunction or failure of a covered item or appliance caused by misuse, neglect, accident, improper loading, failure to comply with the mobile home owner manual's instructions, or with any specific instructions from the respective manufacturer of any covered item, or unauthorized repairs or alterations unless such repairs or alterations were made after being unable to secure warranty service or service contract service by Centurion, Tri-Star or your mobile home dealer, or unreasonable use including a failure to provide reasonable and necessary maintenance. Provided, however, that repairs or alterations made by the manufacturer of appliances or equipment under the terms of their respective warranty obligations made by the manufacturer of appliances or equipment under the terms of their respective warranty shall not be considered as unauthorized repairs or alterations under the terms of this Plan.

d. Any consequential damages, loss of time, inconvenience, commercial loss, loss of use of the mobile home, or other incidental damages such as telephone calls or lodging expenses. However, those costs that you incurred in having to repair the mobile home yourself or for the impairment in the value of the home in the event that it cannot be adequately repaired are covered by this service contract.

e. Normal deterioration due to wear or exposure.

f. Any loss, damage or injury or to property other than the mobile home itself.

g. Any loss caused by casualty, including but not limited to fire, smoke, theft or larceny, malicious mischief, vandalism, falling objects, breakage of glass, missiles, wind storm, nuclear contamination, freezing, lightning, explosion, hail, water, flood or from any other cause whatsoever except as provided in this Plan.

h. Damage caused by improper loading, blocking, leveling or tie down operations.

i. Any loss, damage or defect resulting from defect(s) in the manufacturer's design unless the manufacturer was Centurion.

j. In the event of a replacement of any appliance, credit at a depreciated value will be given by the companies to the Plan Holder towards a new purchase.

APPENDIX C

Dear Centurion Home Owner:

We are denying all or part of your request for service work on your mobile home or for reimbursement of money spent. The work or reimbursement we are denying and our reason for denial are as follows:

If you disagree with our decision, you may, at no cost to you, ask the Better Business Bureau to resolve the dispute. Simply call or write the Better Business Bureau at the address and phone number listed below and provide them the following information:

a. Your name and address and phone number;
b. What work you asked us to do on your mobile home or reimbursement requested (you can send a copy of your claim form);
c. Why you think you are entitled to have this work done or to get reimbursed.

The Better Business Bureau will try to work things out informally between you and Centurion Homes. If the dispute cannot be resolved informally, you are entitled to a hearing before an independent arbitrator, at no cost to you, to be conducted by the Better Business Bureau at a place convenient to you. Centurion must accept the arbitrator's decision, but you do not have to accept the decision.

For consumers who own a mobile home located in New Mexico, call or write:

For consumers who own a mobile home located in Arizona, call or write:

For consumers who own a mobile home located in California, call or write:

For consumers who own a mobile home located somewhere else call or write:

[If appropriate: The remaining part of your request will be fulfilled. We will contact you soon to make the necessary arrangements.]

This letter is being written because of an agreement reached with the Federal Trade Commission. If you have any comments or complaints about how well we are responding to your complaint, let the Federal Trade Commission know at this address:

Federal Trade Commission
Division of Enforcement
Bureau of Consumer Protection
Washington, D.C. 20580

Thank you,
[Name]

APPENDIX D

WARRANTY CLAIM FORM

[Address of Respondent]

1. Name of Owner ______________________ Home Phone ( ) __________ Work Phone ( ) __________
2. Address of Owner ____
   Street Lot No. City State Zip
3. Serial Number of Mobile Home #______________________
4. Address of Mobile Home ____
   Street Lot No City State Zip

5. Describe in detail the problem(s) you experienced with your mobile home, and state when the problem(s) appeared. (Use reverse side if necessary). If you have an inspection report, send us a copy.

6. What did you do to notify the dealer, manufacturer or any government agency about the problem? Try to include approximate dates you called or wrote to complain, and copies of any letters you wrote. If you did not complain please state why. (Note: You may be able to get help even if you cannot remember exactly when you complained, or you do not have a copy of any letter you may have written.)

7. Please state how much (if any) you have already spent for repairs covered by the warranty or how much your mobile home has gone down in value due to the failure to repair the mobile home. If you have any sales receipts, invoices, or cancelled check stubs or a professional estimate of the cost to repair your mobile home or the decrease in value of the mobile home if it cannot be repaired, please send a copy.

ATTESTATION

Under penalty of perjury, I, ______________________ hereby affirm that
(Name of Owner)
all of the above information is true and correct to the best of my knowledge and belief.

______________________ ______________________
Signature of Owner Date

Please return this form to:
[address of respondent]
Be sure to keep a copy of this completed form for your records.

APPENDIX E

SERVICE CONTRACT CLAIM FORM

[Address of Respondent]

1. Name of Owner ______________________ Home Phone ( ) __________ Work Phone ( ) __________
2. Address of Owner______________________
Street Lot No. City State Zip
3. Serial Number of Mobile Home #______________________
4. Address of Mobile Home ______________________
Street Lot No. City State Zip
5. Date of Delivery of Mobile Home ______________________
6. Describe in detail the problem(s) you experienced with your mobile home, and state

when the problem(s) appeared. (Use reverse side if necessary). If you have an inspection report, send us a copy.

7. What did you do to notify the dealer, manufacturer or any government agency about the problem? Try to include approximate dates you called or wrote to complain, and copies of any letters you wrote. If you did not complain please state why. (Note: You may be able to get help even if you cannot remember exactly when you complained, or you do not have a copy of any letter you may have written.)

8. Please state how much (if any) you have already spent for repairs covered by the service contract or how much your mobile home has gone down in value due to the failure to repair the mobile home. If you have any sales receipts, invoices, or cancelled check stubs or a professional estimate of the cost to repair your mobile home or the decrease in value of the mobile home if it cannot be repaired, please send a copy.

ATTESTATION

Under penalty of perjury, I, ______________________________ hereby affirm that all of the above information is true and correct to the best of my knowledge and belief.

______________________________ ______________________________

Signature of Owner Date

Please return this form to:

[address of respondent]

Be sure to keep a copy of this completed form for your records.

IN THE MATTER OF

BEATRICE FOODS CO., ET AL.

Docket 9112. Interlocutory Order, Feb. 27, 1984

ORDER DENYING EXTENSION OF *IN CAMERA* TREATMENT

In response to the Commission's October 14, 1983 order to show cause for a two-year extension of *in camera* treatment for certain documents, respondent Tropicana Products, Inc. has withdrawn its motion for such an extension for all but one document, CX 413B.

CX 413B contains statistical information on Tropicana shipments of chilled and canned citrus products during the four-week period ending March 26, 1978. It is alleged that this information is not otherwise available and that the public disclosure of it would cause "clearly defined, serious injury," justifying the extension of *in camera* treatment under the standard for confidentiality articulated in *H.P. Hood and Sons, Inc.*, 58 F.T.C. 1184 (1961). Tropicana asserts that by knowing its total shipments for a one-month period almost six years ago, competitors could extrapolate from generally available A.C. Nielsen data on chain store distribution to determine the extent and strength of Tropicana's current non-chain distribution to specific geographic markets. It is alleged that non-chain distribution is a "recognized strength of Tropicana's distribution system" and that knowledge of it derived from this information could be utilized by competitors in sales and marketing strategies to Tropicana's competitive detriment. Tropicana Response to Show Cause Order at 5.

It is difficult to evaluate Tropicana's claim that the information in CX 413B is not otherwise available to the competition. We do know that it was submitted to the Florida Canner's Association, some of whose directors were executives of Tropicana's competitors, CX 414 A-B, yet it is unclear whether such individuals ever saw the information in CX 413B or would have been free to share it with their companies if they had. Regardless of this ambiguity, however, it remains the case that this information is now nearly six years old and, therefore, presumably not competitively sensitive unless Tropicana can make a "convincing showing that such data would provide significant insight into its strengths and weaknesses." *General Foods, Corporation*, 95 F.T.C. 352, 353–354 (1980).

We are not convinced it would. Accepting Tropicana's premise that its non-chain distribution is generally competitively sensitive information, we fail to see how competitors could use such old, limited data on total shipments in conjunction with Nielsen data to derive accurate information on Tropicana's *current* non-chain shipments. For such analysis to be possible, the total amounts and geographic areas of Tropicana's distribution today would have to be basically unchanged from what they were six years ago. In support of this assumption, all that Tropicana contends is that there has been "limited relative growth" in the citrus industry, but even if that is true, it does not necessarily follow that Tropicana's volume and pattern of distribution have stayed the same. Absent better proof, we are not convinced that competitors of Tropicana could use the information in CX 413B in the manner suggested to any effective competitive advantage. Adding to our doubts about Tropicana's showing is its equally unsubstantiated claim that *in camera* treatment is needed for only two more years because "predicted . . . industry growth will result in ultimate minimization of the competitive sensitivity of the information." Tropicana Response at 7.

We thus find that Tropicana has not made the convincing showing of competitive injury required in seeking confidential treatment of old documents. In addition to claiming injury, Tropicana argues that there is no "countervailing consideration" in support of disclosing CX 413B to explain the Commission's decision since it was never cited in the opinion. *See General Foods Corp., supra,* 95 F.T.C. at 355. Before such countervailing considerations can even enter the analysis, however, competitive injury from disclosure must appear to be likely. This showing has not been made.

Therefore, *it is ordered* that the motion for extended *in camera* treatment for CX 413B is hereby denied.

Commissioners Miller and Douglas voted in the negative.

In the Matter of

GENERAL MOTORS CORPORATION

Docket 9145. Interlocutory Order, March 7, 1984

Order

By letter of November 1, 1983, Chairman Florio of the House Subcommittee on Commerce, Transportation, and Tourism of the Committee on Energy and Commerce requested access to certain materials in the so-called "GM Defects" case, D. 9145. [102 F.T.C. 1741 (1983)] Generally, the Commission takes the position that it has no authority to withhold information that is responsive to an official request of a congressional committee or subcommittee acting within its jurisdiction. *See* 15 U.S.C. 57b–2(b)(3)(C), 57b–2(d)(1)(A); 5 U.S.C. 552(c). *See also, e.g., Ashland Oil Co.* v. *FTC,* 409 F.Supp. 297 (D.D.C.), *aff'd,* 548 F.2d 977 (D.C. Cir. 1976).

The materials responsive to Chairman Florio's request have been subject to a protective order that was entered by the administrative law judge in December 1980. That protective order limits access to the documents to Commission employees involved in the conduct of the proceeding and ostensibly precludes the Commission from authorizing their transmittal to Congress. Although an ALJ's order that purports to preclude the Commission from complying with an official congressional request for access is of doubtful validity, the Commission concluded that notice of its intention to disclose was appropriate and, on November 23, 1983, it issued an order that General Motors Corporation ("GM") show cause why the ALJ's order should not be modified to conform to the confidentiality provisions of the FTC Act. GM filed a response to that order on December 22, 1983.

General Motor's Response ("Res.") makes three arguments in opposition to the proposed modification. In addition, it requests access to the internal FTC staff memoranda responsive to Chairman Florio's request, return of the documents it submitted as well as of all copies made by staff, and permission to make an *in camera,* oral presentation to the Commission.

A. *GM's Arguments in Opposition and Disposition*

1. Modification After GM's Production in Reliance is Unfair

GM first argues that it is "unfair" for the Commission to "rewrite" its obligations after the company has provided documents in reliance on the order. It points out that "[t]he preamble to the Order straightforwardly declares that it has been 'stipulated and agreed to' by counsel for both General Motors and the Commission." Res. at 2. Finally, the company argues that the order to show cause offers two justifications for modification, both of which "were in existence and known to the Commission when the Order was issued" (*id.*), and neither of which provides, in GM's view, "basis for any subsequent modification." *Id.*

An ALJ has no authority to issue orders that are inconsistent with applicable law, Commission decisions, policy directives or the rules. *See* 16 C.F.R. 0.14. To the extent, therefore, that the ALJ's order in this case bars the Commission from fulfilling its obligation to provide documents in response to official requests of the Congress, it has no force and effect. Nevertheless, as a matter of fairness, the Commission determined to notify the company before responding to Chairman Florio and it issued the November 1983 show cause order. The Commission believes that because its consistent policy has been to provide documents in response to official congressional requests—a fact which has been no secret to the major companies subject to the Commission's jurisdiction[1]—the agency has acted with scrupulous attention to fairness by offering GM formal notice of its intentions and soliciting its views.

Not only have other major companies been aware of the Commission's policy and practice with respect to official congressional requests (*see* note 1 *supra*), but also, GM itself has long been cognizant of the Commission's position by virtue of filings in the subpoena enforcement proceeding that preceded document production in the defects case. *FTC* v. *General Motors Corporation*, No. C–80–276 (N.D. Ohio 1980). Immediately prior to the enactment of the FTC Improvements Act of 1980, the district court had issued a protective order covering most of the documents subsequently made subject to the ALJ's protective order. The court order, which has now expired, limited access to the documents to FTC employees involved in the defects proceeding. Commission counsel sought to convince the court, prior to its issuance of the order, that it should conform the decree to the confidentiality provisions of the FTC Improvements bill, which was then expected to be passed by Congress within days. The court declined. Subsequently, the Commission filed a motion seeking partial relief from the order and arguing specifically for terms that would allow the Commission to provide the documents to Congress in the event they were responsive to an official access request. GM responded vigorously in opposition to the proposed change, among other things, referring to comments that had been made by the court in chambers on what it termed "the inherent tension between *hypothetical* congressional requests for documents and whatever order the

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[1] *See, e.g., Ashland Oil Co.* v. *FTC, supra; Exxon Corp.* v. *FTC*, 589 F.2d 585 (D.C. Cir. 1978).

Court might impose." Respondent's Statement in Opposition to Petitioner's Motion for Relief from Order at 6 (emphasis added).

GM's argument opposing the Commission's current move to modify the similarly restrictive order of the ALJ is therefore inconsistent with its previous suggestion that absent an actual request, the basis for modification was too hypothetical. Moreover, its suggestion that the Commission was, or should have been, aware of the problem of congressional access in 1980 but chose to do nothing is ill-founded. As noted, the Commission did attempt to seek modification of the court's order and, when these efforts failed, complaint counsel should not be faulted for not pursuing the matter before the ALJ while a court order remained in effect that would have superseded any inconsistent provision in an order issued by an ALJ.

In light of the above, the Commission does not believe that modification of the protective order at this time would treat the company unfairly, and it does not consider GM's claims in this respect to bar such a modification.

2. Modification Not in Commission's Interest

The GM memorandum suggests first that because the proposed modification was triggered by Chairman Florio's request for access to the protected documents on behalf of his subcommittee, the Commission's purpose is "to assist that congressman" (Res. at 6) rather than "to advance the interests of the Commission * * * [which] already enjoys full access to the documents." Res. at 7. GM then asserts that "Congress does not need the Commission's help * * * [because it] retains its full constitutional authority to seek discovery of the General Motors documents directly from General Motors." *Id.* Last, GM argues that the modification, if implemented, would cause future parties to be reluctant to provide documents to the Commission pursuant to a protective order "if such an order can be summarily rewritten by the Commission to restrict or even rescind the proffered protection." *Id.*

GM's suggestion that providing documents to Chairman Florio assists the congressman but not the Commission is without merit. Clearly, it is in the Commission's interests to comply with its legal obligations, including those under which it is bound to provide information to Congress upon receipt of an official request. As to the question whether parties might be deterred in the future from providing documents under protective orders issued by ALJ's, parties always are entitled to certain statutory protections and to additional safeguards included in the Commission's rules. These protections have been held by the courts to afford adequate protection for companies responding to compulsory process, and the Commission may not modify a protective order in a manner that is inconsistent with the law or its own rules.

3. Practical Alternative Better Than Modification

Finally, GM suggests a "common sense alternative" to the proposed modification—"General Motors is willing to consider, on a document-by-document basis, allowing the Commission to release such documents to Congress or appropriate law enforcement agencies." Res. at 8. This alternative is predicated both on a recognition that some of the material may be less confidential in 1984 than when it was produced in 1980 and on the condition that the Commission will permit GM to inspect documents, including staff memoranda, that are responsive to official congressional or law enforcement agency requests for access, including this one.

GM's alternative is unacceptable because it would require the Commission to divulge to the company its internal deliberations and those of its staff. The internal memoranda and related documents responsive to Chairman Florio's request consist largely of predecisional and deliberative material such as analyses, opinions and recommendations about the conduct of the then pending investigation. The staff documents also constitute attorney work product that would reveal the mental impressions of the legal staff in preparation for litigation. The documents, therefore, are both exempt from mandatory public disclosure under the Freedom of Information Act (*see NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)) and privileged from civil discovery. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324–25 (D.D.C. 1966), *aff'd on opinion below, V.E.B. Carl Zeiss, Jena* v. *Clark,* 384 F.2d 979 (D.C. Cir.), *cert. denied,* 389 U.S. 952 (1967). The Commission declines to waive either of these protections by acceding to GM's alternative course of action.

B. *GM's Other Requests and Disposition*

For the reasons stated immediately above, the Commission denies GM's request for access to the internal Commission documents responsive to Chairman Florio's request. In addition, because it seems unlikely that GM will raise any arguments that would justify refusing to modify the order so as to permit transmittal of the documents in question to the Subcommittee, the Commission does not believe that oral argument on this matter is warranted.

GM's final request is for return of all documents submitted to the Commission as well as all copies of such materials that may have been made by the Commission staff. GM acknowledges that the Commission staff "was acting within its authority" to make copies of the company submissions (Res. at 10), but it proffers no argument to justify their being surrendered to the company. Requests for return of documents are governed by Section 21(b)(5) of the FTC Act, 15 U.S.C. 57b–2(b)(5), and Section 4.12 of the Commission's Rules of Practice, 16 C.F.R. 4.12 (1983). Both of these provisions specify that the Commission must return company-submitted documents to their submitter at the close of any proceeding arising out of the investigation in which the documents were obtained, and both also allow the Commission to retain copies of those documents. In addition, Rule 4.12(b) provides:

> The Commission will not return to the submitter copies of documents made by the Commission unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.

GM has made no showing of extraordinary circumstances to justify its request for return of all copies of its submissions. The Commission however, hereby directs the Secretary to arrange for the prompt return of original submissions as required by the statute and Rule 4.12.

C. ORDER

In light of the above discussion:

It is hereby ordered, That the protective order issued by the ALJ be modified as described in the Order to Show Cause including provision for both congressional access and access by law enforcement agencies in a manner consistent with the confidentiality provisions of the FTC Act and the Commission's Rules, 15 U.S.C. 46(f), 57b–2(b), and 16 C.F.R. 4.10–4.11 (1983); and

It is further ordered, That GM's request for access to the Commission's internal documents be denied under Exemption 5 of the Freedom of Information Act; and

It is further ordered, That GM's request for return of all copies of documents it submitted to the Commission be denied; and

It is further ordered, That GM's request to make an oral presentation be denied.

IN THE MATTER OF

CLIFFDALE ASSOCIATES, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9156. Complaint, July 7, 1981—Order, March 23, 1984

This order requires a Westport, Conn. firm and two individuals engaged in the advertising, sale and distribution of an automobile retrofit device variously known as the Ball-Matic, the Ball-Matic Valve, the Ball-Matic Gas Saver Valve and the Gas Saver Valve, among other things, to cease representing that the device is a unique or new product; and that it is needed on every vehicle except Volkswagens, diesels and fuel-injection vehicles. The company is barred from making fuel economy improvement claims for the device unless it can reasonably support those claims with competent and reliable substantiation. The order further prohibits the firm from representing that a consumer endorsement is a typical experience of a user of the product; using any endorsement unless they have good reason to believe that the endorser subscribes to the facts and opinions set forth in that endorsement; and failing to disclose any material relationship existing between the endorser and respondents. Additionally, the company may not make any unsubstantiated energy savings claims for any product or misrepresent the results of any test or survey.

Appearances

For the Commission: *William Haynes* and *Wendy Kloner.*

For the respondents: *Solomon H. Friend* and *Jerold Dorfman, Friend, Dorfman & Marks,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Cliffdale Associates, Inc., a corporation, Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, hereinafter sometimes referred to as "respondents," have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Cliffdale Associates, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 180 Post Road, East, Westport, Connecticut.

Respondent Jean-Claude Koven is President of the corporate respondent Cliffdale Associates, Inc. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

Respondent Arthur N. Sussman has been a consultant to Cliffdale Associates, Inc., and has participated in the acts and practices hereinafter set forth. His address is Tamarack Road, Pomona, New York.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth. [2]

PAR. 2. Respondents are now and for sometime last past have been engaged in the advertising, offering for sale, sale, and distribution of a product variously known as the Ball-Matic, the Ball-Matic Gas Saver Valve and the Gas Saver Valve (hereinafter sometimes referred to as "Ball-Matic" or "product"), which product is advertised as a means of improving fuel economy in automobiles. Said product is an automobile retrofit device as "automobile retrofit device" is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011. Respondents, in connection with the marketing of said product, have disseminated, published and distributed, and now disseminate, publish and distribute advertisements and promotional materials for the purpose of promoting the sale of said product.

PAR. 3. In the course and conduct of their business, the respondents have disseminated and caused the dissemination of certain advertisements for the product through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations for the purpose of inducing, and which have induced, directly or indirectly, the purchase of said product in commerce.

PAR. 4. Among the advertisements and other sales promotional materials disseminated by respondents are the materials identified as Exhibits A-F which are attached hereto.

PAR. 5. Through the use of the advertisements referred to in Paragraph Four, and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that

a. the Ball-Matic is an important, significant, and unique new invention;

b. the Ball-Matic is needed on every motor vehicle except Volkswagens, diesel vehicles, or fuel injection vehicles;

c. the Ball-Matic when installed in a typical automobile and used under normal driving conditions will significantly improve fuel economy;

d. under normal driving conditions, a typical driver can usually obtain a fuel economy improvement of 20% (or more) or an improvement that will approximate or equal four miles per gallon when the Ball-Matic is installed in his/her automobile;

e. competent scientific tests prove the fuel economy claims made for the Ball-Matic;

f. results of consumer usage, as evidenced by consumer endorsements, prove that the Ball-Matic significantly improves fuel economy; [3]

g. the consumer endorsements that appear in advertisements and sales promotional materials for the Ball-Matic are statements of persons who have used the Ball-Matic in the recent past or are currently using the Ball-Matic and who have given permission for the publication of these statements;

h. all consumer endorsements which appear in advertisements and sales promotional materials for the Ball-Matic were obtained from individuals or other entities who, at the time of providing their endorsements, were independent from all of the individuals and entities that have marketed the Ball-Matic;

i. the consumer endorsements that appear in advertisements and sales promotional materials for the Ball-Matic reflect the typical or ordinary experience of members of the public who have used the Ball-Matic.

Par. 6. In truth and in fact, contrary to respondents' representations set forth in Paragraph Five:

a. the Ball-Matic is not an important, significant, or unique new invention;

b. the Ball-Matic is not needed on every motor vehicle except Volkswagens, diesel vehicles, or fuel injection vehicles.

c. the Ball-Matic when installed in a typical automobile will not significantly improve fuel economy;

d. under normal conditions, a typical driver cannot usually obtain a fuel economy improvement that will approximate or equal 20% or four miles per gallon when the Ball-Matic is installed in his/her automobile;

e. no competent scientific tests prove the fuel economy claims for the Ball-Matic;

f. results of consumer usage, as evidenced by consumer endorsements, do not prove that the Ball-Matic significantly improves fuel economy;

g. some individuals whose endorsements appeared in advertisements and sales promotional materials for the Ball-Matic did not give prior permission for the use of their endorsements, did not use the [4] Ball-Matic at the time of the publication of their endorsements, and had not used the device in the recent past;

h. some consumer endorsements that appeared in advertisements and sales promotional materials for the Ball-Matic were obtained from individuals who, at the time they provided the endorsements, were not independent of all individuals and entities that have marketed the Ball-Matic.

i. the consumer endorsements and sales promotional materials do not reflect the typical or ordinary experience of members of the public who have used the Ball-Matic.

Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 7. At the time respondents made the representations alleged in Paragraph Five of the complaint, they did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

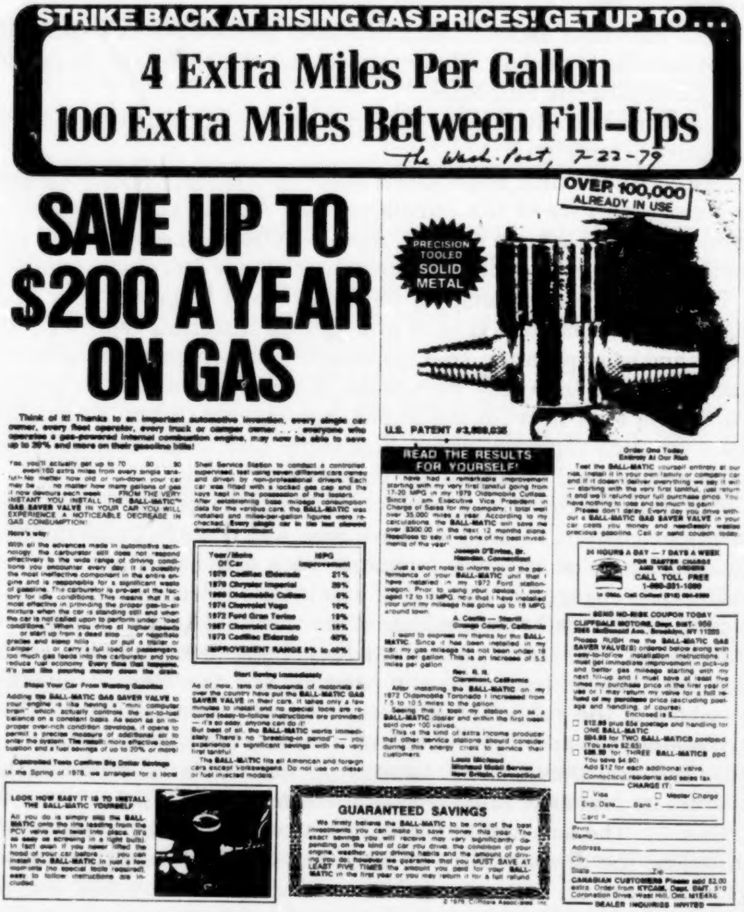
PAR. 8. The advertisements referred to in Paragraph Four and other advertisements and sales promotional materials represent, directly and by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Five. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of automobile retrofit devices.

PAR. 10. The use by respondents of the aforesaid unfair or deceptive statements, representations, acts and practices, directly or by implication, has had and now has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 11. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in [5] violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

EXHIBIT A



STRIKE BACK AT RISING GAS PRICES! GET UP TO . . .

4 Extra Miles Per Gallon
100 Extra Miles Between Fill-Ups

The Wash. Post, 7-22-79

SAVE UP TO $200 A YEAR ON GAS

OVER 100,000 ALREADY IN USE
PRECISION TOOLED SOLID METAL
U.S. PATENT #3,868,035

Think of it! Thanks to an important automotive invention, every single car owner, every fleet operator, every truck or camper owner . . . everyone who operates a gas-powered internal combustion engine, may now be able to save up to 20% and more on their gasoline bills!

Yes, you'll actually get up to 70 . . . 80 . . . 90 . . . even 100 extra miles from every single tankful—No matter how old or run-down your car may be . . . no matter how many gallons of gas it now devours each week . . . FROM THE VERY INSTANT YOU INSTALL THE BALL-MATIC™ GAS SAVER VALVE IN YOUR CAR YOU WILL EXPERIENCE A NOTICEABLE DECREASE IN GAS CONSUMPTION!

Here's why:

With all the advances made in automotive technology, the carburetor still does not respond effectively to the wide range of driving conditions you encounter every day. It is possibly the most ineffective component in the entire engine and is responsible for a significant waste of gasoline. The carburetor is pre-set at the factory for idle conditions. This means that it is most effective in providing the proper gas-to-air mixture when the car is standing still and when the car is not called upon to perform under "load conditions." When you drive at higher speeds . . . or start up from a dead stop . . . or negotiate grades and steep hills . . . or pull a trailer or camper . . . or carry a full load of passengers, too much gas feeds into the carburetor and you reduce fuel economy. Every time that happens, it's just like pouring money down the drain.

Stops Your Car From Wasting Gasoline

Adding the BALL-MATIC GAS SAVER VALVE to your engine is like having a "mini computer brain" which actually controls the air-to-fuel balance on a constant basis. As soon as an improper over-rich condition develops, it opens to permit a precise measure of additional air to enter the system. The result: more effective combustion and a fuel savings of up to 20% or more!

Controlled Tests Confirm Big Dollar Savings

In the Spring of 1978, we arranged for a local Shell Service Station to conduct a controlled, supervised, test using seven different cars owned and driven by non-professional drivers. Each car was fitted with a locked gas cap and the keys kept in the possession of the testers. After establishing base mileage consumption data for the various cars, the BALL-MATIC was installed and miles-per-gallon figures were re-checked. Every single car in the test showed dramatic improvement.

Year/Make Of Car	MPG Improvement
1976 Cadillac Eldorado	21%
1976 Chrysler Imperial	20%
1969 Oldsmobile Cutlass	8%
1974 Chevrolet Vega	10%
1972 Ford Gran Torino	18%
1967 Chevrolet Camaro	16%
1973 Cadillac Eldorado	40%
IMPROVEMENT RANGE 8% to 40%	

Start Saving Immediately

As of now, tens of thousands of motorists all over the country have put the BALL-MATIC GAS SAVER VALVE in their cars. It takes only a few minutes to install and no special tools are required (easy-to-follow instructions are provided) — it's so easy, anyone can do it!

But best of all, the BALL-MATIC works immediately. There's no "breaking-in period" — you experience a significant savings with the very first tankful.

The BALL-MATIC fits all American and foreign cars except Volkswagens. Do not use on diesel or fuel injected models.

LOOK HOW EASY IT IS TO INSTALL THE BALL-MATIC YOURSELF

All you do is simply slip the BALL-MATIC onto the line leading from the PCV valve and twist into place. (It's as easy as screwing in a light bulb). In fact even if you never lifted the hood of your car before . . . you can install the BALL-MATIC in just a few moments (no special tools required), easy to follow instructions are included.

READ THE RESULTS FOR YOURSELF!

I have had a remarkable improvement starting with my very first tankful going from 17-20 MPG in my 1979 Oldsmobile Cutlass. Since I am Executive Vice President in Charge of Sales for my company, I total well over 35,000 miles a year. According to my calculations, the BALL-MATIC will save me over $300.00 in the next 12 months alone. Needless to say, it was one of my best investments of the year!

Joseph D'Errico, Sr.
Hamden, Connecticut

Just a short note to inform you of the performance of your BALL-MATIC unit that I have installed in my 1972 Ford station-wagon. Prior to using your device, I averaged 12 to 13 MPG, now that I have installed your unit my mileage has gone up to 16 MPG around town.

A. Castle — Sheriff
Orange County, California

I want to express my thanks for the BALL-MATIC. Since it has been installed in my car, my gas mileage has not been under 18 miles per gallon. This is an increase of 5.5 miles per gallon.

Rev. R. R.
Claremont, California

After installing the BALL-MATIC on my 1972 Oldsmobile Toronado I increased from 7.5 to 10.5 miles to the gallon.

Seeing this I took my station on as a BALL-MATIC dealer and within the first week sold over 100 valves.

This is the kind of extra income producer that other service stations should consider during this energy crisis to service their customers.

Louis Michaud
Michaud Mobil Service
New Britain, Connecticut

GUARANTEED SAVINGS

We firmly believe the BALL-MATIC to be one of the best investments you can make to save money this year. The exact savings you will receive may vary significantly depending on the kind of car you drive, the condition of your engine, weather, your driving habits and the amount of driving you do, however we guarantee that you MUST SAVE AT LEAST FIVE TIMES the amount you paid for your BALL-MATIC in the first year or you may return it for a full refund.

© 1979 Clippdale Associates, Inc.

Order One Today Entirely At Our Risk

Test the BALL-MATIC yourself entirely at our risk. Install it in your own family or company car and if it doesn't deliver everything we say it will — starting with the very first tankful, just return it and we'll refund your full purchase price. You have nothing to lose and so much to gain!

Please don't delay. Every day you drive without a BALL-MATIC GAS SAVER VALVE in your car costs you money and needlessly wastes precious gasoline. Call or send coupon today.

24 HOURS A DAY — 7 DAYS A WEEK
FOR MASTER CHARGE AND VISA ORDERS
CALL TOLL FREE
1-800-331-1000
In Ohio, Call Collect (513) [illegible]

SEND NO-RISK COUPON TODAY

CLIPPDALE MOTORS, Dept. BMT- 950
2065 McDonald Ave., Brooklyn, NY 11223

Please RUSH me the BALL-MATIC GAS SAVER VALVE(S) ordered below along with easy-to-follow installation instructions. I must get immediate improvement in pick-up and better gas mileage starting with my next fill-up and I must save at least five times my purchase price in the first year of use or I may return my valve for a full refund of my purchase price (excluding postage and handling, of course).

Enclosed is $________

☐ $12.95 plus 85¢ postage and handling for ONE BALL-MATIC
☐ $24.95 for TWO BALL-MATICS postpaid (You save $2.65)
☐ $36.50 for THREE BALL-MATICS ppd (You save $4.90)
Add $12 for each additional valve.
Connecticut residents add sales tax.

CHARGE IT:
☐ Visa ☐ Master Charge
Exp. Date____ Bank # __ __ __ __
Card # ________

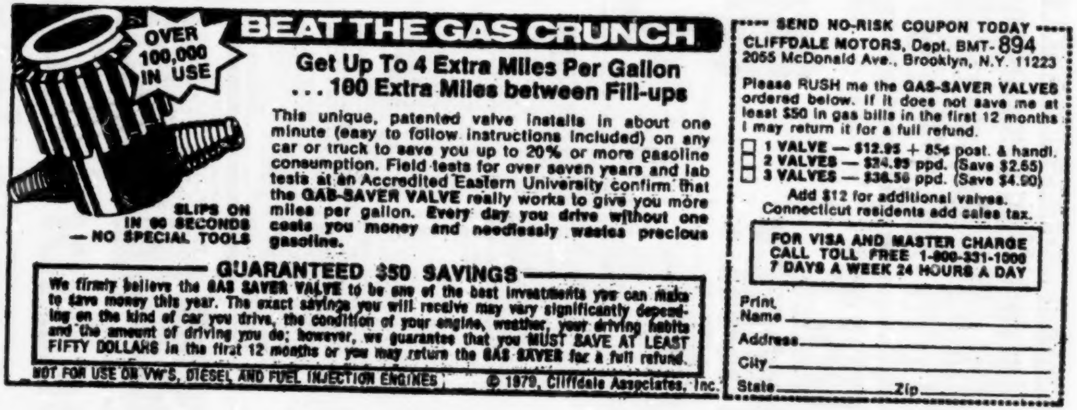
Print
Name ________
Address ________
City ________
State ________ Zip ________

CANADIAN CUSTOMERS Please add $2.00 extra. Order from KYCAM, Dept. BMT, 510 Coronation Drive, West Hill, Ont. M1E4X6

DEALER INQUIRIES INVITED

24 The Washington Post Magazine / July 22, 1979

EXHIBIT B



OVER 100,000 IN USE

BEAT THE GAS CRUNCH

Get Up To 4 Extra Miles Per Gallon
. . . 160 Extra Miles between Fill-ups

This unique, patented valve installs in about one minute (easy to follow instructions included) on any car or truck to save you up to 20% or more gasoline consumption. Field tests for over seven years and lab tests at an Accredited Eastern University confirm that the GAS-SAVER VALVE really works to give you more miles per gallon. Every day you drive without one costs you money and needlessly wastes precious gasoline.

SLIPS ON
IN 60 SECONDS
—NO SPECIAL TOOLS

GUARANTEED $50 SAVINGS

We firmly believe the GAS SAVER VALVE to be one of the best investments you can make to save money this year. The exact savings you will receive may vary significantly depending on the kind of car you drive, the condition of your engine, weather, your driving habits and the amount of driving you do; however, we guarantee that you MUST SAVE AT LEAST FIFTY DOLLARS in the first 12 months or you may return the GAS SAVER for a full refund.

NOT FOR USE ON VW'S, DIESEL AND FUEL INJECTION ENGINES

© 1979, Cliffdale Associates, Inc.

---- SEND NO-RISK COUPON TODAY ----

CLIFFDALE MOTORS, Dept. BMT-894
2055 McDonald Ave., Brooklyn, N.Y. 11223

Please RUSH me the GAS-SAVER VALVES ordered below. If it does not save me at least $50 in gas bills in the first 12 months I may return it for a full refund.

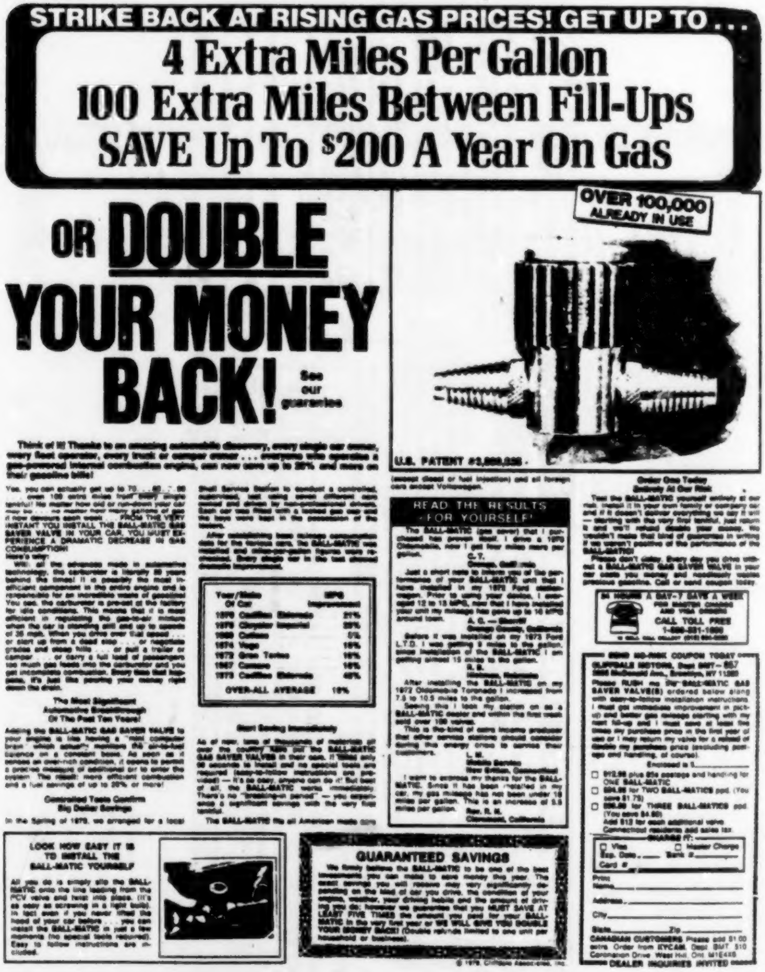
☐ 1 VALVE — $12.95 + 85¢ post. & handl.
☐ 2 VALVES — $24.95 ppd. (Save $2.65)
☐ 3 VALVES — $36.50 ppd. (Save $4.90)

Add $12 for additional valves.
Connecticut residents add sales tax.

FOR VISA AND MASTER CHARGE
CALL TOLL FREE 1-800-331-1000
7 DAYS A WEEK 24 HOURS A DAY

Print Name ____________________
Address ____________________
City ____________________
State __________ Zip __________

EXHIBIT C



STRIKE BACK AT RISING GAS PRICES! GET UP TO . . .

4 Extra Miles Per Gallon
100 Extra Miles Between Fill-Ups
SAVE Up To $200 A Year On Gas

OR DOUBLE YOUR MONEY BACK! See our guarantee

OVER 100,000 ALREADY IN USE

READ THE RESULTS FOR YOURSELF!

OVER-ALL AVERAGE 19%

GUARANTEED SAVINGS

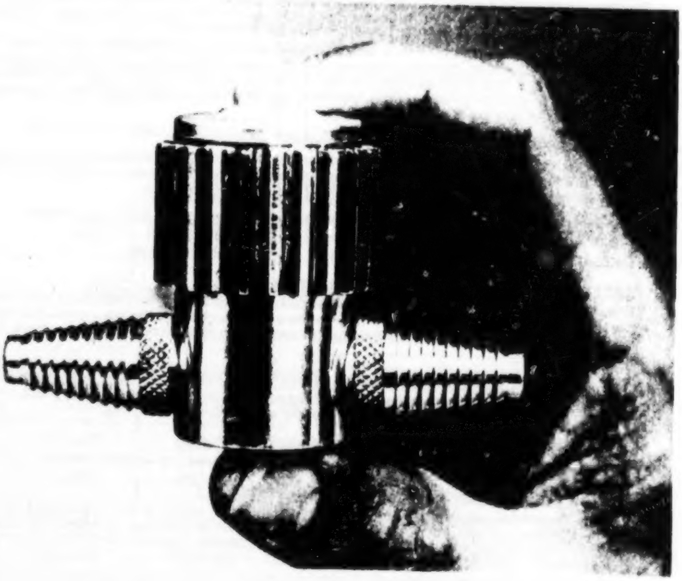
CALL TOLL FREE

EXHIBIT D

EVERY CAR NEEDS ONE!

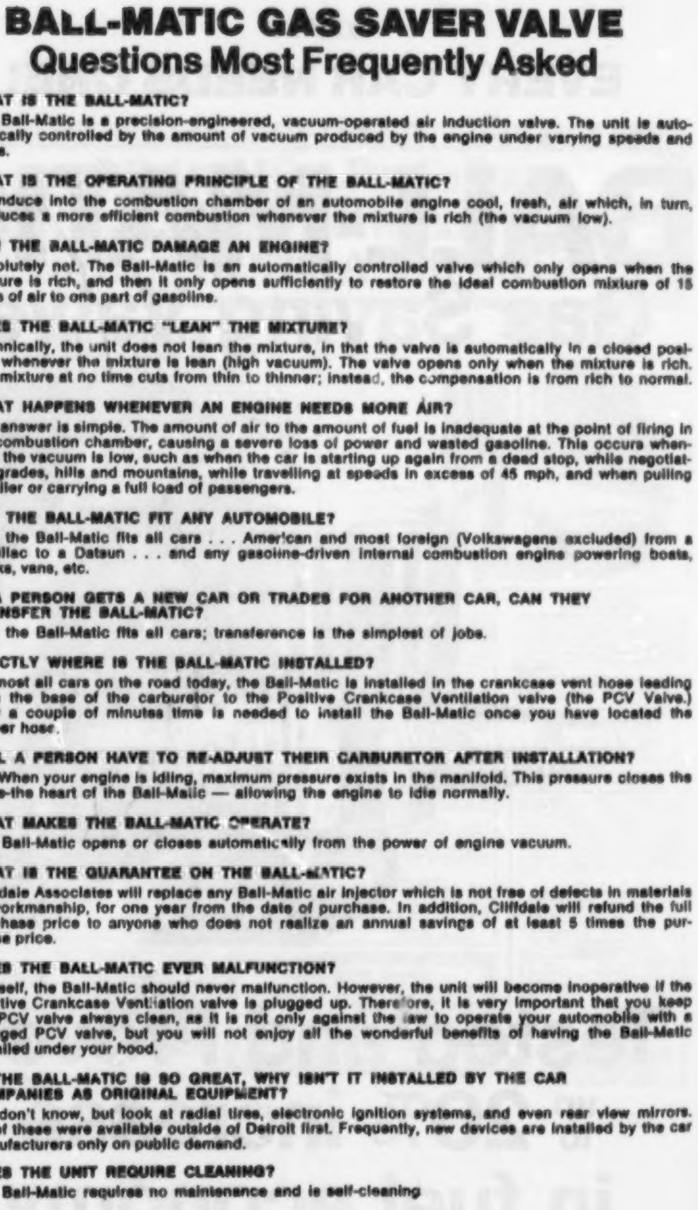
BALL-MATIC

Gas Saving Valve



Tested and Proven

up to 20% increase in fuel economy



BALL-MATIC GAS SAVER VALVE

Questions Most Frequently Asked

Q. WHAT IS THE BALL-MATIC?

A. The Ball-Matic is a precision-engineered, vacuum-operated air induction valve. The unit is automatically controlled by the amount of vacuum produced by the engine under varying speeds and loads.

Q. WHAT IS THE OPERATING PRINCIPLE OF THE BALL-MATIC?

A. To induce into the combustion chamber of an automobile engine cool, fresh, air which, in turn, produces a more efficient combustion whenever the mixture is rich (the vacuum low).

Q. CAN THE BALL-MATIC DAMAGE AN ENGINE?

A. Absolutely not. The Ball-Matic is an automatically controlled valve which only opens when the mixture is rich, and then it only opens sufficiently to restore the ideal combustion mixture of 15 parts of air to one part of gasoline.

Q. DOES THE BALL-MATIC "LEAN" THE MIXTURE?

A. Technically, the unit does not lean the mixture, in that the valve is automatically in a closed position whenever the mixture is lean (high vacuum). The valve opens only when the mixture is rich. The mixture at no time cuts from thin to thinner; instead, the compensation is from rich to normal.

Q. WHAT HAPPENS WHENEVER AN ENGINE NEEDS MORE AIR?

A. The answer is simple. The amount of air to the amount of fuel is inadequate at the point of firing in the combustion chamber, causing a severe loss of power and wasted gasoline. This occurs whenever the vacuum is low, such as when the car is starting up again from a dead stop, while negotiating grades, hills and mountains, while travelling at speeds in excess of 45 mph, and when pulling a trailer or carrying a full load of passengers.

Q. WILL THE BALL-MATIC FIT ANY AUTOMOBILE?

A. Yes, the Ball-Matic fits all cars . . . American and most foreign (Volkswagens excluded) from a Cadillac to a Datsun . . . and any gasoline-driven internal combustion engine powering boats, trucks, vans, etc.

Q. IF A PERSON GETS A NEW CAR OR TRADES FOR ANOTHER CAR, CAN THEY TRANSFER THE BALL-MATIC?

A. Yes, the Ball-Matic fits all cars; transference is the simplest of jobs.

Q. EXACTLY WHERE IS THE BALL-MATIC INSTALLED?

A. On most all cars on the road today, the Ball-Matic is installed in the crankcase vent hose leading from the base of the carburetor to the Positive Crankcase Ventilation valve (the PCV Valve.) Only a couple of minutes time is needed to install the Ball-Matic once you have located the proper hose.

Q. WILL A PERSON HAVE TO RE-ADJUST THEIR CARBURETOR AFTER INSTALLATION?

A. No. When your engine is idling, maximum pressure exists in the manifold. This pressure closes the valve-the heart of the Ball-Matic — allowing the engine to idle normally.

Q. WHAT MAKES THE BALL-MATIC OPERATE?

A. The Ball-Matic opens or closes automatically from the power of engine vacuum.

Q. WHAT IS THE GUARANTEE ON THE BALL-MATIC?

A. Cliffdale Associates will replace any Ball-Matic air injector which is not free of defects in materials or workmanship, for one year from the date of purchase. In addition, Cliffdale will refund the full purchase price to anyone who does not realize an annual savings of at least 5 times the purchase price.

Q. DOES THE BALL-MATIC EVER MALFUNCTION?

A. In itself, the Ball-Matic should never malfunction. However, the unit will become inoperative if the Positive Crankcase Ventilation valve is plugged up. Therefore, it is very important that you keep the PCV valve always clean, as it is not only against the law to operate your automobile with a plugged PCV valve, but you will not enjoy all the wonderful benefits of having the Ball-Matic installed under your hood.

Q. IF THE BALL-MATIC IS SO GREAT, WHY ISN'T IT INSTALLED BY THE CAR COMPANIES AS ORIGINAL EQUIPMENT?

A. We don't know, but look at radial tires, electronic ignition systems, and even rear view mirrors. All of these were available outside of Detroit first. Frequently, new devices are installed by the car manufacturers only on public demand.

Q. DOES THE UNIT REQUIRE CLEANING?

A. The Ball-Matic requires no maintenance and is self-cleaning

Q. WHAT PRECAUTIONS MUST ONE TAKE TO MAKE SURE OF ALL THE BENEFITS YOU CLAIM?

A. It is only necessary to make sure your PCV valve is not plugged up and that you have installed the Ball-Matic in the crankcase vent hose leading from the base of the carburetor to the PCV valve on all late model automobiles.

Q. WHY IS THE BALL-MATIC NEEDED ON A CAR?

A. Since its inception, the internal combustion engine has been notoriously inefficient, due to the design of the carburetor. The carburetor is set at the factory in the idle position for maximum efficiency. The air-fuel mixture is set at a 15 to 1 ratio, which is efficient only until a speed of 30 to 40 mph (2,000 rpm) is reached. At this point, the combustion chamber demands more fuel and the amount of gasoline entering the chamber increases while the amount of air is fixed. This results in an overly rich mixture of fuel and air; this mixture burns incompletely, resulting in waste of gasoline and loss of power through inefficient combustion. The Ball-Matic was designed to minimize this loss of power — thus increasing power — to provide a situation where there is less carbon build-up thus minimizing engine wear, to permit quicker acceleration and better engine performance.

In 1977, the 113,696,111* registered automobiles in the U.S. consumed 107,978,395,000 gallons of gasoline. If each of these vehicles had a Ball-Matic, the potential savings would have been almost *6 million gallons of gasoline per day.*

***Source: U.S. Dept. of Transportation — Federal Highway Administration.**

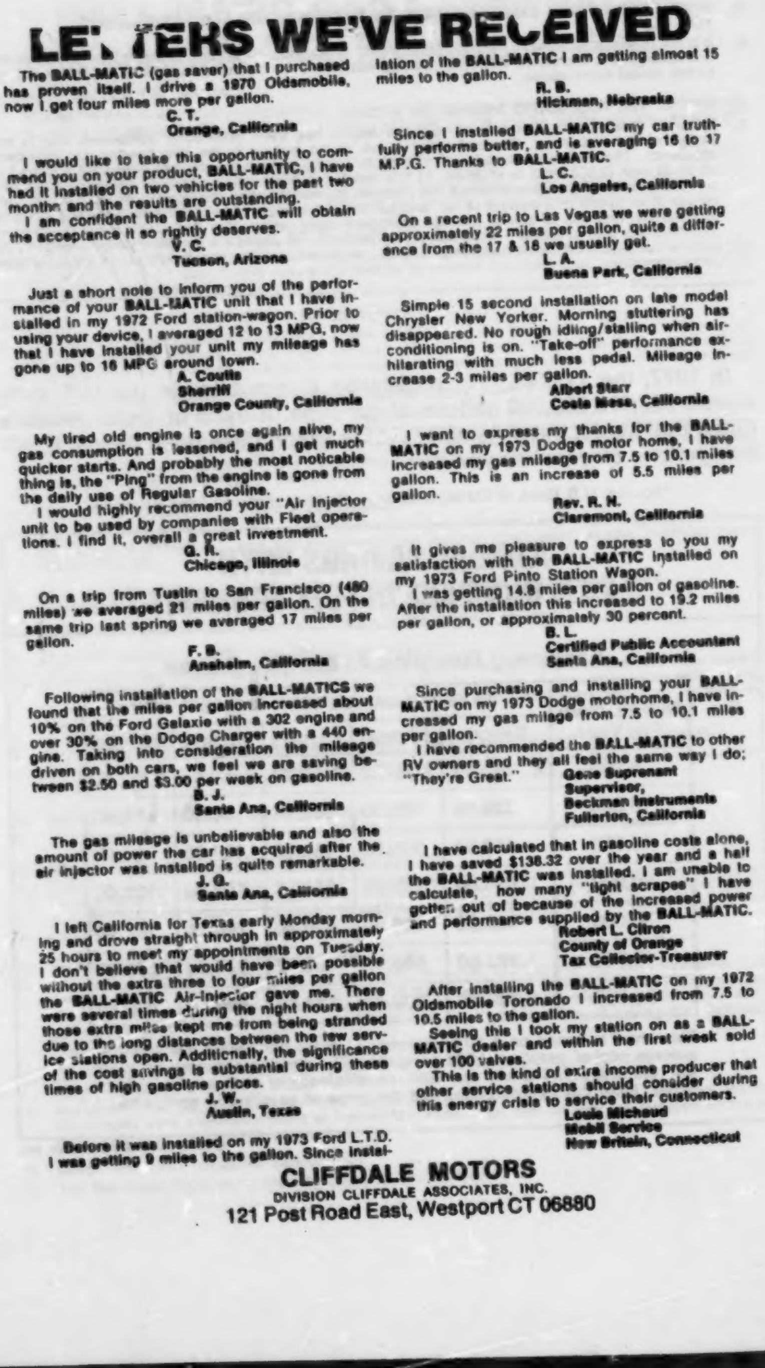
ANNUAL SAVINGS WITH 20% INCREASE IN FUEL ECONOMY

Assuming Gasoline At 80¢ Per Gallon

Miles Driven Per Year	MILES PER GALLON YOUR CAR GETS NOW				
	5 mpg	10 mpg	15 mpg	20 mpg	25 mpg
5,000	$ 160.00	$ 80.00	$ 53.33	$ 40.00	$ 32.00
10,000	320.00	160.00	106.67	80.00	64.00
15,000	480.00	240.00	160.00	120.00	96.00
20,000	640.00	320.00	213.33	160.00	128.00
30,000	960.00	480.00	320.00	240.00	192.00
40,000	1,280.00	640.00	426.67	320.00	256.00
50,000	1,600.00	800.00	533.33	400.00	320.00

This chart is based on a 20% increase in miles per gallon assuming an average cost of gasoline at 80¢ per gallon. The specific economy achieved with the BALL-MATIC will vary with the efficiency of each engine, driving habits, local driving conditions and the price of gasoline in each area.

© 1979, Cliffdale Associates, Inc.



LETTERS WE'VE RECEIVED

The **BALL-MATIC** (gas saver) that I purchased has proven itself. I drive a 1970 Oldsmobile, now I get four miles more per gallon.

C. T.
Orange, California

I would like to take this opportunity to commend you on your product, **BALL-MATIC**, I have had it installed on two vehicles for the past two months and the results are outstanding.

I am confident the **BALL-MATIC** will obtain the acceptance it so rightly deserves.

V. C.
Tucson, Arizona

Just a short note to inform you of the performance of your **BALL-MATIC** unit that I have installed in my 1972 Ford station-wagon. Prior to using your device, I averaged 12 to 13 MPG, now that I have installed your unit my mileage has gone up to 16 MPG around town.

A. Coutis
Sherriff
Orange County, California

My tired old engine is once again alive, my gas consumption is lessened, and I get much quicker starts. And probably the most noticable thing is, the "Ping" from the engine is gone from the daily use of Regular Gasoline.

I would highly recommend your "Air Injector unit to be used by companies with Fleet operations. I find it, overall a great investment.

G. R.
Chicago, Illinois

On a trip from Tustin to San Francisco (480 miles) we averaged 21 miles per gallon. On the same trip last spring we averaged 17 miles per gallon.

F. B.
Anaheim, California

Following installation of the **BALL-MATICS** we found that the miles per gallon increased about 10% on the Ford Galaxie with a 302 engine and over 30% on the Dodge Charger with a 440 engine. Taking into consideration the mileage driven on both cars, we feel we are saving between $2.50 and $3.00 per week on gasoline.

B. J.
Santa Ana, California

The gas mileage is unbelievable and also the amount of power the car has acquired after the air injector was installed is quite remarkable.

J. G.
Santa Ana, California

I left California for Texas early Monday morning and drove straight through in approximately 25 hours to meet my appointments on Tuesday. I don't believe that would have been possible without the extra three to four miles per gallon the **BALL-MATIC** Air-Injector gave me. There were several times during the night hours when those extra miles kept me from being stranded due to the long distances between the few service stations open. Additionally, the significance of the cost savings is substantial during these times of high gasoline prices.

J. W.
Austin, Texas

Before it was installed on my 1973 Ford L.T.D. I was getting 9 miles to the gallon. Since installation of the BALL-MATIC I am getting almost 15 miles to the gallon.

R. B.
Hickman, Nebraska

Since I installed **BALL-MATIC** my car truthfully performs better, and is averaging 16 to 17 M.P.G. Thanks to **BALL-MATIC.**

L. C.
Los Angeles, California

On a recent trip to Las Vegas we were getting approximately 22 miles per gallon, quite a difference from the 17 & 18 we usually get.

L. A.
Buena Park, California

Simple 15 second installation on late model Chrysler New Yorker. Morning stuttering has disappeared. No rough idling/stalling when air-conditioning is on. "Take-off" performance exhilarating with much less pedal. Mileage increase 2-3 miles per gallon.

Albert Starr
Costa Mesa, California

I want to express my thanks for the **BALL-MATIC** on my 1973 Dodge motor home, I have increased my gas mileage from 7.5 to 10.1 miles per gallon. This is an increase of 5.5 miles per gallon.

Rev. R. H.
Claremont, California

It gives me pleasure to express to you my satisfaction with the **BALL-MATIC** installed on my 1973 Ford Pinto Station Wagon.

I was getting 14.8 miles per gallon of gasoline. After the installation this increased to 19.2 miles per gallon, or approximately 30 percent.

B. L.
Certified Public Accountant
Santa Ana, California

Since purchasing and installing your **BALL-MATIC** on my 1973 Dodge motorhome, I have increased my gas milage from 7.5 to 10.1 miles per gallon.

I have recommended the **BALL-MATIC** to other RV owners and they all feel the same way I do; "They're Great."

Gene Suprenant
Supervisor,
Beckman Instruments
Fullerton, California

I have calculated that in gasoline costs alone, I have saved $138.32 over the year and a half the BALL-MATIC was installed. I am unable to calculate, how many "tight scrapes" I have gotten out of because of the increased power and performance supplied by the BALL-MATIC.

Robert L. Citron
County of Orange
Tax Collector-Treasurer

After installing the **BALL-MATIC** on my 1972 Oldsmobile Toronado I increased from 7.5 to 10.5 miles to the gallon.

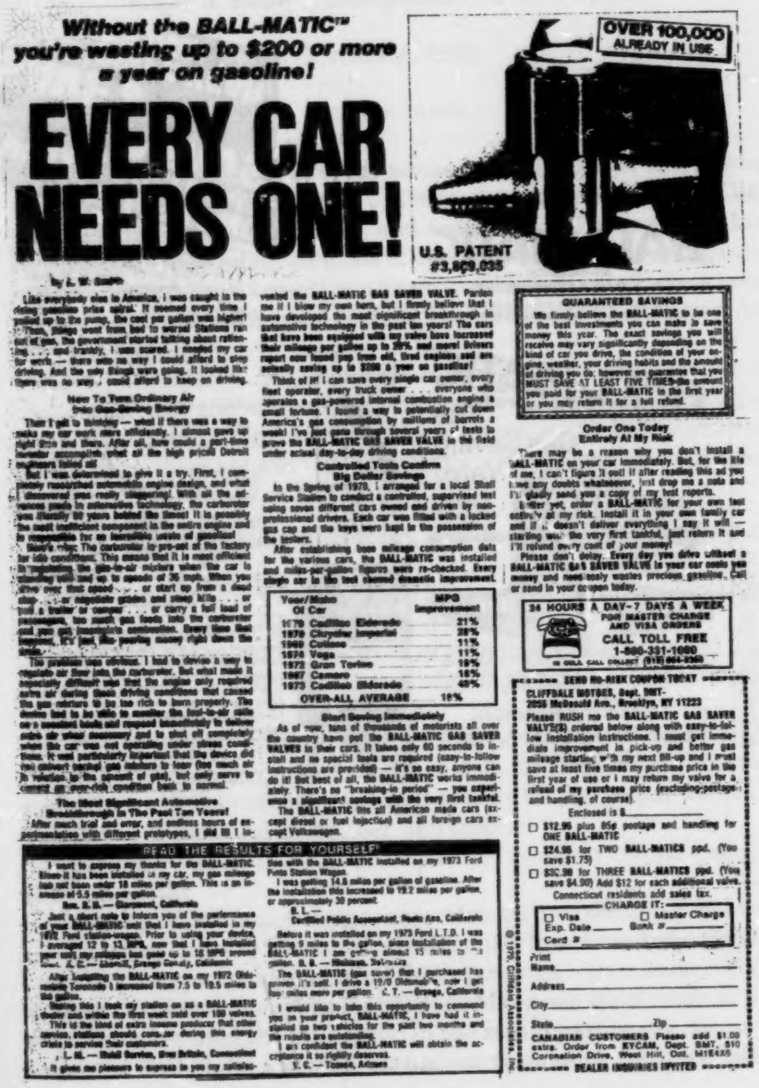
Seeing this I took my station on as a **BALL-MATIC** dealer and within the first week sold over 100 valves.

This is the kind of extra income producer that other service stations should consider during this energy crisis to service their customers.

Louis Michaud
Mobil Service
New Britain, Connecticut

CLIFFDALE MOTORS
DIVISION CLIFFDALE ASSOCIATES, INC.
121 Post Road East, Westport CT 06880

EXHIBIT E


OVER 100,000
ALREADY IN USE
U.S. PATENT
#3,809,035

Without the BALL-MATIC™ you're wasting up to $200 or more a year on gasoline!

EVERY CAR NEEDS ONE!

by L. W. Smith

Like everybody else in America, I was caught in the rising gasoline price spiral. It seemed every time I pulled up to the pump, the cost per gallon was higher! Then, things went from bad to worse! Stations ran out of gas, the government started talking about rationing . . . and frankly, I was scared. I needed my car for work — there was no way I could afford to stop driving. And the way things were going, it looked like there was no way I could afford to keep on driving.

How To Turn Ordinary Air Into Gas-Saving Energy

Then I got to thinking — what if there was a way to make my car work more efficiently. I almost gave up right then and there. After all, how could a part-time inventor accomplish what all the high priced Detroit engineers failed at?

But I was determined to give it a try. First, I completely researched automobile engine design, and what I discovered was really staggering! With all the advances made in automotive technology, the carburetor was literally 50 years behind the times! It is possibly the most inefficient component in the entire engine and is responsible for an incredible waste of gasoline!

Here's why: The carburetor is pre-set at the factory for idle conditions. This means that it is most efficient in regulating the gas-to-air mixture when the car is standing still and up to speeds of 30 mph. When you drive over that speed . . . or start up from a dead stop . . . or negotiate grades and steep hills . . . or pull a trailer or camper . . . or carry a full load of passengers, too much gas feeds into the carburetor and you get incomplete combustion. Every time that happens, it's just like pouring money right down the drain.

The problem was obvious. I had to devise a way to regulate air flow into the carburetor. But what made it especially difficult was that the engine only required extra air during those driving conditions that caused the gas mixture to be too rich to burn properly. The device had to be able to monitor the fuel-to-air ratio on a constant basis and respond immediately to deliver extra air when necessary and to shut off completely when the car was not operating under stress conditions. It was particularly important that the device did not convert normal gas mixture to lean (too much air in relation to the amount of gas), but only serve to correct an over-rich condition back to normal.

The Most Significant Automotive Breakthrough In The Past Ten Years!

After much trial and error, and endless hours of experimentation with different prototypes, I did it! I invented the BALL-MATIC GAS SAVER VALVE. Pardon me if I blow my own horn, but I firmly believe that I have developed the most significant breakthrough in automotive technology in the past ten years! The cars that have been equipped with my valve have increased their mileage per gallon up to 20% and more! Drivers report new found pep from old, tired engines and are actually saving up to $200 a year on gasoline!

Think of it! I can save every single car owner, every fleet operator, every truck owner . . . everyone who operates a gas-powered internal combustion engine a small fortune. I found a way to potentially cut down America's gas consumption by millions of barrels a week! I've just gone through several years of tests to prove the BALL-MATIC GAS SAVER VALVE in the field under actual day-to-day driving conditions.

Controlled Tests Confirm Big Dollar Savings

In the Spring of 1978, I arranged for a local Shell Service Station to conduct a controlled, supervised test using seven different cars owned and driven by non-professional drivers. Each car was fitted with a locked gas cap and the keys were kept in the possession of the testers.

After establishing base mileage consumption data for the various cars, the BALL-MATIC was installed and miles-per-gallon figures were re-checked. Every single car in the test showed dramatic improvement.

Year/Make Of Car	MPG Improvement
1978 Cadillac Eldorado	21%
1970 Chrysler Imperial	28%
1969 [illegible]	11%
1974 Vega	11%
1972 Gran Torino	19%
1967 Camaro	18%
1973 Cadillac Eldorado	40%
OVER-ALL AVERAGE	19%

Start Saving Immediately

As of now, tens of thousands of motorists all over the country have put the BALL-MATIC GAS SAVER VALVES in their cars. It takes only 60 seconds to install and no special tools are required (easy-to-follow instructions are provided) — it's so easy, anyone can do it! But best of all, the BALL-MATIC works immediately. There's no "breaking-in period" — you experience a significant savings with the very first tankful.

The BALL-MATIC fits all American made cars (except diesel or fuel injection) and all foreign cars except Volkswagen.

GUARANTEED SAVINGS

We firmly believe the BALL-MATIC to be one of the best investments you can make to save money this year. The exact savings you will receive may vary significantly depending on the kind of car you drive, the condition of your engine, weather, your driving habits and the amount of driving you do; however we guarantee that you MUST SAVE AT LEAST FIVE TIMES the amount you paid for your BALL-MATIC in the first year or you may return it for a full refund.

Order One Today Entirely At My Risk

There may be a reason why you don't install a BALL-MATIC on your car immediately. But, for the life of me, I can't figure it out! If after reading this ad you have any doubts whatsoever, just drop me a note and I'll gladly send you a copy of my test reports.

Better yet, order a BALL-MATIC for your own test entirely at my risk. Install it in your own family car and if it doesn't deliver everything I say it will — starting with the very first tankful, just return it and I'll refund every cent of your money!

Please don't delay. Every day you drive without a BALL-MATIC GAS SAVER VALVE in your car costs you money and needlessly wastes precious gasoline. Call or send in your coupon today.

24 HOURS A DAY–7 DAYS A WEEK
FOR MASTER CHARGE AND VISA ORDERS
CALL TOLL FREE
1-800-331-1000
IN OKLA. CALL COLLECT (918) [illegible]

SEND NO-RISK COUPON TODAY

CLIFFDALE MOTORS, Dept. BMT-
2056 McDonald Ave., Brooklyn, NY 11223

Please RUSH me the BALL-MATIC GAS SAVER VALVE(S) ordered below along with easy-to-follow installation instructions. I must get immediate improvement in pick-up and better gas mileage starting with my next fill-up and I must save at least five times my purchase price in the first year of use or I may return my valve for a refund of my purchase price (excluding postage and handling, of course).

Enclosed is $__________

☐ $12.95 plus 85¢ postage and handling for ONE BALL-MATIC

☐ $24.95 for TWO BALL-MATICS ppd. (You save $1.75)

☐ $3C.98 for THREE BALL-MATICS ppd. (You save $4.90) Add $12 for each additional valve.

Connecticut residents add sales tax.

CHARGE IT:
☐ Visa ☐ Master Charge
Exp. Date _____ Bank # __________
Card # __________

Print Name __________

Address __________

City __________

State __________ Zip __________

CANADIAN CUSTOMERS Please add $1.00 extra. Order from KYCAM, Dept. BMT, 510 Coronation Drive, West Hill, Ont. M1E4X5

DEALER INQUIRIES INVITED

© 1978, Cliffdale Associates, Inc.

READ THE RESULTS FOR YOURSELF!

I want to express my thanks for the BALL-MATIC. Since it has been installed in my car, my gas mileage has not been under 18 miles per gallon. This is an increase of 5.5 miles per gallon.
Rev. S. B. — Claremont, California

Just a short note to inform you of the performance of your BALL-MATIC unit that I have installed in my 1972 Ford station-wagon. Prior to using your device, I averaged 12 to 13 MPG, now that I have installed your unit my mileage has gone up to 18 MPG around town. A. C. — Sheriff, Orange County, California

After installing the BALL-MATIC on my 1972 Oldsmobile Toronado I increased from 7.5 to 10.5 miles to the gallon.

Seeing this I took my station on as a BALL-MATIC dealer and within the first week sold over 100 valves.

This is the kind of extra income producer that other service stations should consider during this energy crisis to service their customers.
L. M. — Mobil Service, New Britain, Connecticut

It gives me pleasure to express to you my satisfaction with the BALL-MATIC installed on my 1973 Ford Pinto Station Wagon.

I was getting 14.8 miles per gallon of gasoline. After the installation this increased to 19.2 miles per gallon, or approximately 30 percent.
B. L. —
Certified Public Accountant, Santa Ana, California

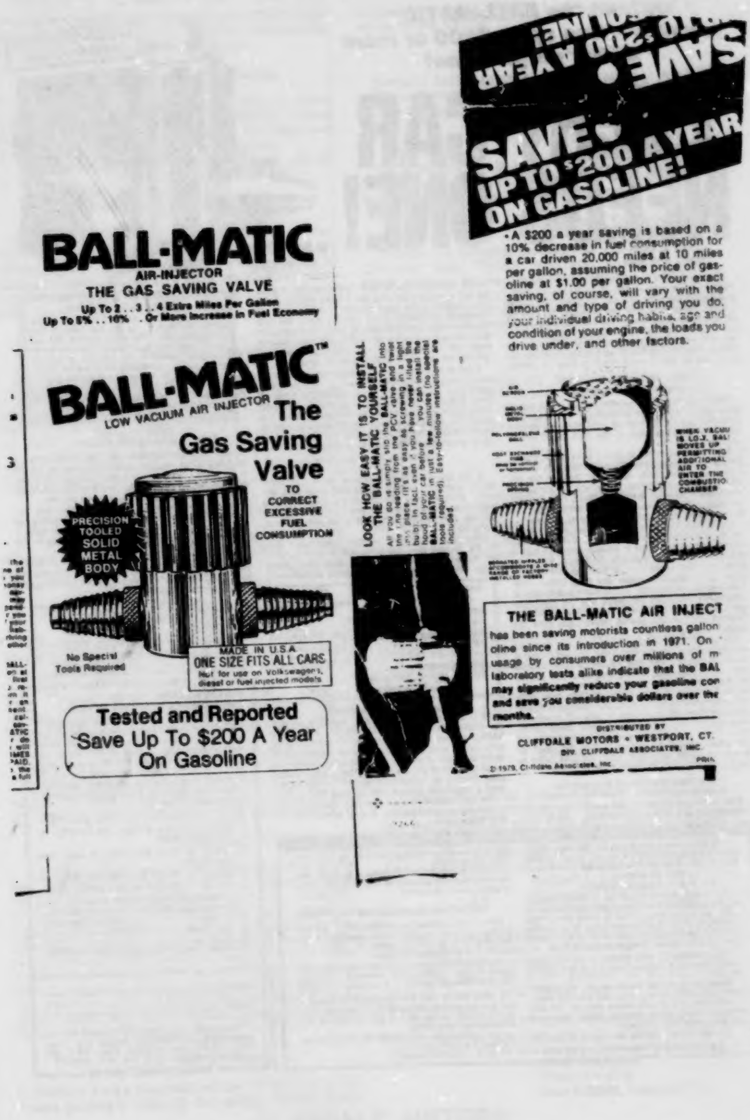
Before it was installed on my 1973 Ford L.T.D. I was getting 9 miles to the gallon, since installation of the BALL-MATIC I am getting almost 15 miles to the gallon. B. B. — [illegible], Delaware

The BALL-MATIC (gas saver) that I purchased has proven it's self. I drive a 1970 Oldsmobile, now I get four miles more per gallon. C. T. — Orange, California

I would like to take this opportunity to commend you on your product, BALL-MATIC, I have had it installed on two vehicles for the past two months and the results are outstanding.

I am confident the BALL-MATIC will obtain the acceptance it so rightly deserves.
V. C. — Tucson, Arizona

EXHIBIT F



BALL-MATIC
AIR-INJECTOR
THE GAS SAVING VALVE
Up To 2 . . . 3 . . . 4 Extra Miles Per Gallon
Up To 5% . . . 10% . . . Or More Increase in Fuel Economy

BALL-MATIC™
LOW VACUUM AIR INJECTOR
The Gas Saving Valve
TO CORRECT EXCESSIVE FUEL CONSUMPTION

PRECISION TOOLED SOLID METAL BODY

No Special Tools Required

MADE IN U.S.A.
ONE SIZE FITS ALL CARS
Not for use on Volkswagen's, diesel or fuel injected models

Tested and Reported
Save Up To $200 A Year
On Gasoline

LOOK HOW EASY IT IS TO INSTALL THE BALL-MATIC YOURSELF

All you do is simply slip the BALL-MATIC into the line leading from the PCV valve and twist into place. (It's as easy as screwing in a light bulb). In fact, even if you have never lifted the hood of your car before . . . you can install the BALL-MATIC in just a few minutes (no special tools required). Easy-to-follow instructions are included.

SAVE• UP TO $200 A YEAR ON GASOLINE!

•A $200 a year saving is based on a 10% decrease in fuel consumption for a car driven 20,000 miles at 10 miles per gallon, assuming the price of gasoline at $1.00 per gallon. Your exact saving, of course, will vary with the amount and type of driving you do, your individual driving habits, age and condition of your engine, the loads you drive under, and other factors.

THE BALL-MATIC AIR INJECT

has been saving motorists countless gallon
oline since its introduction in 1971. On
usage by consumers over millions of m
laboratory tests alike indicate that the BAL
may significantly reduce your gasoline con
and save you considerable dollars over the
months.

DISTRIBUTED BY
CLIFFDALE MOTORS • WESTPORT, CT.
DIV. CLIFFDALE ASSOCIATES, INC.

© 1979, Cliffdale Associates, Inc.

INITIAL DECISION BY

MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

OCTOBER 8, 1982

INTRODUCTION

The Federal Trade Commission issued its complaint in this matter on July 7, 1981 (mailed August 5, 1981), charging respondents Cliffdale Associates, Inc. ("Cliffdale") and Jean-Claude Koven and Arthur N. Sussman with unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

More particularly, the Commission charged that respondents, in connection with the advertising, offering for sale, sale, and distribution of an "automobile retro fit" device known as the Ball-Matic Gas Saver Valve ("Ball-Matic" or "Ball-Matic Valve"), had misrepresented that (Complaint ¶¶ 5, 6): [2]

a. the Ball-Matic is an important, significant, and unique new invention;

b. the Ball-Matic is needed on every motor vehicle except Volkswagens, diesel vehicles, or fuel injection vehicles;

c. the Ball-Matic, when installed in a typical automobile and used under normal driving conditions, will significantly improve fuel economy;

d. under normal driving conditions, a typical driver can usually obtain a fuel economy improvement of 20% (or more) or an improvement that will approximate or equal four miles per gallon when the Ball-Matic is installed in his/her automobile;

e. competent scientific tests prove the fuel economy claims made for the Ball-Matic;

f. results of consumer usage, as evidenced by consumer endorsements, prove that the Ball-Matic significantly improves fuel economy;

g. the consumer endorsements that appear in advertisements and sales promotional materials for the Ball-Matic are statements of persons who have used the Ball-Matic in the recent past or are currently using the Ball-Matic and who have given permission for the publication of these statements;

h. all consumer endorsements which appear in advertisements and sales promotional materials for the Ball-Matic were obtained from individuals or other entities who, at the time of providing their endorsements, were independent from all of the individuals and entities that have marketed the Ball-Matic;

i. the consumer endorsements that appear in advertisements and sales promotional materials for the Ball-Matic reflect the typical or ordinary experience of members of the public who have used the Ball-Matic. [3]

The Commission also charged that, in their advertisements and promotional material, respondents misrepresented that they had a reasonable basis for making the above enumerated claims about fuel economy (Complaint ¶ 8).

The Commission also charged that because respondents did not have a reasonable basis for making such claims, the advertisements and promotional materials were deceptive or unfair (Complaint ¶ 7).

In their answer to the complaint filed September 29, 1981, respondents admitted only that (1) Cliffdale is a Connecticut corporation and that its office and principal place of business is located at 180 Post Road East, Westport, Connecticut; (2) that respondent Jean-Claude Koven ("Koven") is its president; (3) that for a period of time, until approximately December 1979, Cliffdale marketed a product known as the Ball-Matic Valve; and (4) that in the course and conduct of its business, prior to December 1979, Cliffdale disseminated advertisements for the Ball-Matic Valve (Answer ¶¶ 1–3). Respondents denied all other allegations of the complaint and further alleged as follows (Answer ¶¶ 12–14):

> The complaint fails to state a claim against Respondents upon which relief can be granted;
>
> The Federal Trade Commission has failed to demonstrate that a formal proceeding with respect to the alleged violations is in the public interest; and
>
> The Federal Trade Commission lacks jurisdiction over the subject matter and the Respondents with respect to the matters alleged in the complaint.

Accompanying the complaint was an eight part notice order setting forth the form of order "the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint" (Complaint, Notice Order). The Commission also stated (Complaint, Notice):

> Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution and refunds [4] for past, present, and future consumers and such other types of relief as a rest forth in Section 19(b) of the Federal Trade Commission

Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

On January 5, 1982, following most of the pretrial discovery conducted by both parties, the Administrative Law Judge scheduled adjudicative hearings to commence on February 2, 1982, in Los Angeles, California.

On January 25, 1982, respondents filed a motion for consideration of a proposed consent agreement and to withdraw the matter from adjudication pursuant to Section 3.25 of the Commission's Rules of Practice ("Motion, Docket 9156"). The consent order proposed by respondents was substantially the same as the consent order issued against the manufacturer and distributor of the Ball-Matic Valve (*Compare* Agreement Containing Order to Cease and Desist, File No. 812–3182, Motion, Docket 9156, Exhibit 2 with Proposed Agreement Containing Consent Order, Motion, Docket 9156, Exhibit 4).

At a prehearing conference held January 25, 1982, complaint counsel opposed respondents' motion (*see* PHC tr. 46–72). Complaint counsel argued that the proposed consent order was not adequate and that any disposition of this matter by consent procedures would preclude the Commission from seeking consumer redress under Section 19 of the Act (*see* PHC tr. 74). After the Administrative Law Judge refused to certify the matter to the Commission because he could not make the required finding as to the likelihood of a settlement on the basis of any order other than the notice order that accompanied the complaint (PHC tr. 89, 92), respondents, on January 27, 1982, filed a supplemental submission to their motion which included a form of order identical to the notice order. On January 28, 1982, the Administrative Law Judge certified respondents' motion, as supplemented, to the Commission stating: "Notwithstanding complaint counsel's opposition to any consent order, I find that there is a 'likelihood of settlement', if the Commission is willing to forego the possibility of seeking consumer redress in federal court." On January 29, 1982, the Commission denied respondents' motion.

Thereafter, nine days of adjudicative hearings were held: February 2, 3 and 4 in Los Angeles, and February 23 and 24, [5] March 2, 3, and 4, and April 14, 1982, in New York, New York. After rulings were made on certain evidentiary matters and the transcript of the last day of hearings was received from the Office of the Secretary, the record was closed for the receipt of evidence on May 28, 1982. The parties filed their proposed findings and conclusions of law on July 14, 1982, and their answering briefs on July 28, 1982. On August 17, 1982, the Commission granted the Administrative Law Judge's request for an extension of time until September 24, 1982, in which to file the initial decision in this matter, and on September 24, 1982, further extended the time to file the initial decision until October 8, 1982.

On July 14, 1982, the Administrative Law Judge advised the Office of the Secretary that certain documentary exhibits were missing from the official documentary exhibit binders in Docket No. 9156. On September 28, 1982, the Office of the Secretary advised the Administrative Law Judge that they had located all but four of those exhibits. On October 5, 1982, the Administrative Law Judge issued an order certifying his bench copies of CX 141, RX 7, RX 243A–D and RX 257F to the Office of the Secretary for incorporation into the official record.

Any motions appearing on the record not heretofore specifically ruled upon either directly or by the necessary effect of this initial decision are hereby denied.

Preliminary Statement

The principal issues presented in this matter go to whether respondents made the representations challenged in the complaint, whether such representations, if made, were false, and whether respondents had a reasonable basis for the fuel economy claims that were contained in the advertisements.

The evidence of record in this case demonstrates that owners of some vehicles (other than Volkwagens and vehicles containing diesel and fuel injection engines) may experience fuel economy of up to 11% by installing a Ball-Matic Valve. The controversy in this matter evolves from respondents' advertising claims that owners of all vehicles (except Volkswagens and vehicles containing diesel and fuel injection engines) could expect to obtain up to 20% or more fuel economy or 4 extra miles per gallon from the use of the Ball-Matic Valve and Commission counsel's position that no significant savings can be expected from use of the product. [6]

In this respect, respondents rely heavily on consumer testimonials which report fuel economy savings of up to 20% or more and up to 4 miles per gallon or more, whereas Commission counsel rely upon the testimony of their expert witnesses to the effect that consumers cannot measure the fuel consumption of their automobiles accurately enough to determine whether the Ball-Matic Valve does effect fuel economy. They also rely on an engine dynomometer laboratory test which demonstrated that the fuel economy to be expected from use of the Ball-Matic Valve was, under conditions favorable for its operation, quite small, *i.e.* less than 5%.

According to respondents, the actual performance of the Ball-Matic Valve must be determined by actual use on an automobile, and that laboratory tests using chassis dynamometers or engine dynamometers do not duplicate or represent the driving conditions under which the Ball-Matic Valve will work.

I have considered the entire record in this matter as well as the demeanor of the witnesses, and the proposed findings of fact submitted by counsel and their arguments. All proposed findings that are not adopted in form or substance by the effect of this initial decision are rejected as being argumentative, irrelevant to the issues in this matter, or not supported by the record.

FINDINGS AS TO THE FACTS

1. Cliffdale is a Connecticut corporation with its office and principal place of business at 180 Post Road East, Westport, Connecticut (Answer ¶ 1). It was established in 1977 by respondent Koven and his wife, Beth Koven, who are the sole shareholders of the corporation (CX 153A, ¶ 1 (Stip.); tr. 889 (Koven)). It is a marketing company that has engaged in the mail order sale of products (tr. 889–891 (Koven)). Among the products that have been marketed by Cliffdale is the Ball-Matic Valve (Answer ¶ 2). Total net sales of Cliffdale for the year ending December 31, 1979, was $692,998 (tr. 963 (Stip.)).

2. Respondent Koven has been president of Cliffdale since its incorporation in 1977 (tr. 889 (Koven)). He has directed the marketing and advertising activities of Cliffdale, and has shared responsibility for the administrative and bookkeeping aspects of the corporation's operation with Mrs. Koven (tr. 892 (Koven)). Koven has been engaged in various mail order and marketing businesses since 1970 (*see* tr. 887–893, 972 (Koven)).

3. Respondent Sussman acted as a consultant to Cliffdale from January 6, 1979, to July 1, 1979 (Sussman Admission No. 28). [7] His responsibility as consultant was to "bring in new products" to be sold by mail order by Cliffdale (tr. 804–806 (Sussman); tr. 894 (Koven)). Sussman had an agreement with Cliffdale that if Cliffdale's profits from the mail order sale of products that he "brought in" reached $25,000, a separate corporation would be established of which he would be half owner and from which he would receive half of the profits (*see* CX 153A–B ¶ 4 (Stip.); tr. 804 (Sussman); tr. 999 (Koven)). Sussman met Koven in 1976 when they both worked for Film Corporation of America (tr. 804, 836 (Sussman); tr. 893 (Koven)). Sussman had been employed by various mail order businesses since 1970 (tr. 800–803 (Sussman)). One of the products Sussman "brought" to Cliffdale was the Ball-Matic Valve (tr. 806–808 (Sussman)).

4. Sherwood Marketing ("Sherwood"), also a Connecticut corporation (not a respondent), was established in October 1978. The original

shareholders were Martin Howard and Mrs. Koven, each owning 50%. In July 1979, Sherwood acquired Cliffdale's mail order business pursuant to the agreement between Cliffdale and Sussman (*see* Finding 3, *supra*). At that time Sherwood acquired the assets and liabilities of Cliffdale's mail order business. The major assets acquired were the advertisements for the Ball-Matic Valve and the right to receive income from mail order sales prior to July 1, 1979; the major obligations assumed were the obligations to pay suppliers, the obligation to pay for prior advertisements, and the obligation to make refunds when requested regardless of when the sales were made. In September 1979, Sussman acquired Howard's 50% interest in Sherwood. From July 1, to September 14, 1979, Sussman was an employee of Sherwood and was primarily responsible for implementing Sherwood's acquisition of Cliffdale's mail order operation (CX 153A–B ¶ 4 (Stip.)). After the transfer of Cliffdale's mail order business to Sherwood, Sussman and Koven received equal salaries from Sherwood at the rate of $75,000 annually (tr. 837–39 (Sussman); tr. 998 (Koven)). Koven withdrew from Sherwood in the spring of 1980 (tr. 999 (Koven)). Sherwood filed a voluntary petition for bankruptcy under Chapter 7 of the U.S. Bankruptcy laws in November 1980, was liquidated in bankruptcy and no longer exists as a corporation (tr. 1591–92 (Sussman)).

5. Koven and Sussman were actively involved in all aspects of the mail order marketing of the Ball-Matic Valve by Cliffdale and Sherwood. Along with Howard, they created the advertisements which are the subject of this proceeding (tr. 816 (Sussman); tr. 924–38 (Koven)). They both benefitted from the sale of the Ball-Matic Valve (*see* Finding 4 *supra*). It is found that respondents, as individuals, were both responsible [8] for the activities of Cliffdale and Sherwood in the marketing of the Ball-Matic Valve.

6. In the course and conduct of their business, respondent Cliffdale and respondents Koven and Sussman (through Cliffdale and Sherwood) have disseminated advertisements for the Ball-Matic Valve in interstate commerce by publishing them in newspapers and magazines with national circulation (tr. 1491 (Stip.); Cliffdale and Koven Admission No. 21; Sussman Admission No. 21). Total advertising expenditures by Cliffdale and Sherwood for the Ball-Matic Valve have been substantial, a total of $549,973 having been expended from April 1979 through November 1979 (*see* CXs 18–25). In the further course of their businesses, Cliffdale and Sherwood have disseminated through the mail in interstate commerce promotional materials for the Ball-Matic Valve such as CX 13 through CX 17 (Sussman Admission Nos. 16, 17 and 19; Koven Admission Nos. 15, 16, 17, 19, 20, 22; tr. 860–62 (Sussman)). In the further course and conduct of their businesses, sales of the Ball-Matic Valve were made by Cliffdale and

Sherwood by sending Ball-Matic Valves through the mail to consumers located in various parts of the United States (CX 153 D ¶ 25). Revenue from the sale of Ball-Matic Valves totaled $1,781,876 (CXs 66, 67). In marketing the Ball-Matic Valve the respondents were in competition with the sellers of other products marketed to improve gasoline consumption (Koven Admission No. 25; Sussman Admission No. 25).

7. It is found, on the basis of the facts set forth in Finding 6, *supra*, that respondents Cliffdale, Koven and Sussman have engaged in commerce as "commerce" is defined in the Federal Trade Commission Act, and their business activities relating to the matters alleged in the complaint have been "in commerce" and "affect commerce" within the meaning of these terms as set forth in the Federal Trade Commission Act.

8. The Ball-Matic Valve is what is called an "air-bleed" device (tr. 444 (Patterson); CX 49A; RX 244A). Its purpose is to admit additional air into a vehicle's engine to lean the air-fuel mixture, thus improving gasoline mileage (tr. 172 (Smith), tr. 509 (Patterson)). It is inserted into the positive crankcase ventilation line ("PCV Line") of an engine (CX 99C; *see* CX 99K reproduced at page 8a, *infra*). The Ball-Matic Valve consists of a ball, spring, filter, and metal case (CX 99C, K). The ball, in combination with the casing, serves as a valve, which is designed to open when the vacuum in the engine is low thus admitting additional air into the engine. When the vacuum rises, the valve shuts (CX 99C; *see* CX 99K, reproduced at p. 8a, *infra*). Relatively lower vacuum is experienced in an engine [8a]

Figure 1

Schematic of Ball-Matic Installation

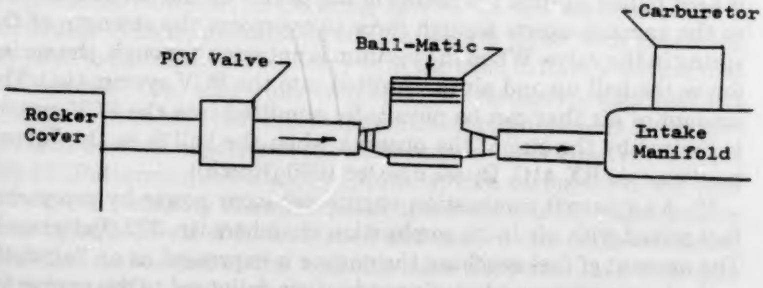
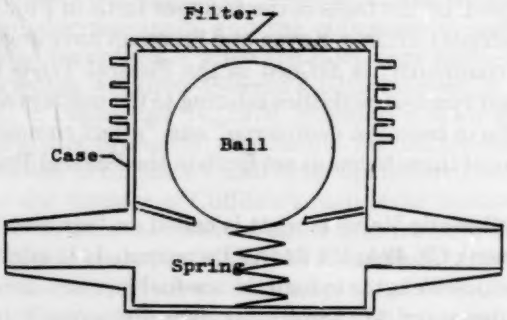


Figure 2

Ball-Matic Construction



[9] during rapid acceleration or "floor boarding" of the foot pedal, while negotiating steep grades and hills, or while pulling trailers or campers (tr. 515–16, 518, 521, 524 (Patterson)).

9. The opening and closing of the Ball-Matic Valve is determined by the interplay of the strength of the spring in the Ball-Matic Valve and the vacuum of the engine (tr. 509 (Patterson); CX 99C). The ball is kept pulled against the casing of the device by the vacuum so long as the vacuum exerts enough force to overcome the strength of the spring in the valve. When the vacuum is not strong enough, the spring forces the ball up and air is admitted into the PCV system (*id.*). The amount of air that can be physically admitted into the PCV system is limited by the size of the opening when the ball is in the "open" position (*see* RX 41C, D; *see also* tr. 1090 (Korth)).

10. An internal combustion engine produces power by processing fuel mixed with air in its combustion chambers (tr. 372 (Patterson)). The amount of fuel reaching the engine is expressed as an "air-fuel" ratio showing the number of pounds of air delivered to the engine for

each pound of fuel that is delivered (tr. 387 (Patterson)). Gasoline engines are usually most efficient at air-fuel ratios slightly above the stoichiometric (chemically correct) value; in non-stoichiometric mixtures, there is either excess fuel (a rich mixture) or excess air (a lean mixture) in the combustion chamber (RX 212J). The excess fuel or excess air does not enter into the combustion process (*Id.*). The air and fuel entering the engine are mixed in the carburetor, which has a fuel metering system consisting of cruise circuits (providing fuel for normal operating conditions), idle jets (providing additional fuel when the vehicle is idling), and power jets (providing additional fuel when high power output is necessary) (tr. 390, 515 (Patterson); tr. 1092 (Korth)). In addition, the choke richens the mixture when the engine is cold (tr. 390 (Patterson)). Typically, carburetors are set according to normal operating conditions (cruise conditions) (tr. 387–90 (Patterson)). The actual carburetion of a particular model of vehicle is determined by the manufacturer (*id.*). The carburetor can be set to operate "rich" (low air fuel ratios), "lean" (high air-fuel ratios), or at a level anywhere in between. The carburetor setting is permanent and is not expected to change over time. Devices such as the Ball-Matic Valve admit air into the engine in addition to the air entering through the carburetor and the air which would normally enter through the PCV line (CX 99C). This additional air will dilute the air-fuel mixture. Depending upon the "air-fuel" ratio of the carburetor of a particular vehicle, the admission of additional air will [10] lead to an improvement in fuel economy, no change in fuel economy, or an actual decline in fuel economy (CX 99E, L). If the "air-fuel" ratio is "rich", improvement in fuel economy may result (CX 99; *see* ALJX 120).

11. The designed carburetion of vehicles on the road has been changed by manufacturers over the years. A number of factors, including government regulations concerning emissions and fuel economy, the increasing public demand for fuel efficient vehicles, and major technological advances in regulating emission, have led to frequent changes in carburetion systems in recent years (tr. 388–89 (Patterson)). However, in deciding how to set the carburetor for a particular vehicle, manufacturers are always faced with balancing the need to optimize fuel economy with the need to have a vehicle that is "drivable" (*i.e.*, that runs smoothly, is responsive, and does not hesitate or stumble), that meets the emission requirements set by law, and that does not experience excessive engine "knocking" (tr. 388–90, 506–07 (Patterson); RX 212 J). Typically, rich carburetion will lead to better driveability characteristics; however, this may also lead to unacceptable levels of hydrocarbon and carbon monoxide emissions (*id.*). Cars carbureted on the lean side have less power, and thus may have driveability problems (*id.*); however, they have better hydrocar-

bon and carbon monoxide emission characteristics (*id.*). Cars with leaner carburetion also tend to experience engine knocking (*id.*). In the 1950's and earlier, cars were typically carbureted on the rich side. However, in the late 1950's and early 1960's concern about air pollution led to changes in carburetion and vehicles were then carbureted with leaner air-fuel ratios. Typically, 1960 to 1974 vehicles were carbureted chemically correct or leaner. From 1975 to 1980, vehicles were typically carbureted at or near the point of best fuel economy which occurs at an even leaner air-fuel ratio. This change was made possible by the use of the catalytic converter to control emissions (CX 99F, U). In 1979, when respondents made their advertising claims, there were 44,399,000 vehicles on the road manufactured from 1975 through 1979 and 60,264,000 vehicles manufactured before 1975 (RX 106C).

12. The record contains twelve advertisements for the Ball-Matic Valve (CXs 1–12) and five pieces of promotional material (CXs 13–17). The record also contains the publication schedules of the advertisements covering a period from April 17, 1979, to November 12, 1979 (CXs 18–25). Cliffdale placed the advertisements prior to July 1, 1979, and Sherwood placed advertisements from July 1 to approximately July 15, 1979 (Respondents' Admission No. 3). Certain promotional materials [11] were disseminated by Cliffdale during the period April 17 to December 3, 1979 (CXs 13, 15, 17) and by Sherwood (CXs 16, 17) during the period July 1 to December 3, 1979 (Cliffdale and Koven Admissions Nos. 16, 17; Sussman Admission No. 20).

13. With some minor language differences and different headlines, the advertisements are substantially similar. For example some of the headlines state:

> SAVE MONEY SAVE MONEY SAVE MONEY SAVE MONEY Without the Ball-Matic you're wasting up to $200 or more on gasoline EVERY CAR NEEDS ONE! (CX 1; *see* CX 5).

* * * * * * *

> STRIKE BACK AT RISING GAS PRICES! GET UP TO 4 EXTRA MILES PER GALLON—100 EXTRA MILES BETWEEN FILL-UPS—SAVE UP TO $200 A YEAR ON GAS OR DOUBLE YOUR MONEY BACK (CX 2; *see* CXs 3, 4).

* * * * * * *

> GET UP TO 4 EXTRA MILES PER GALLON—100 EXTRA MILES BETWEEN FILL-UPS—SAVE UP TO $200 A YEAR ON GAS (CXs 7, 8; *see* CXs 10, 11).

In most of the advertisements language similar to the following paragraphs appears somewhere in the text:

> Think of it! Thanks to an important automobile invention, every single car owner, every fleet operator, every truck or camper owner . . . everyone who operates a gas-

powered combustion engine, may now be able to save up to 20% and more on their gasoline bills! (CX 8; *see* CXs 2, 3, 4, 6, 7, 10, 11, 12).

* * * * * * *

The BALL-MATIC fits all American and foreign cars except Volkswagens. Do not use on diesel or fuel injection models (CX 8; *see* CXs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12). [12]

* * * * * * *

. . . [T]he carburetor is pre-set at the factory for idle conditions. This means that it is most efficient in regulating the gas-to-air mixture when the car is standing still and up to speeds of 35 mph. When you drive over that speed . . . or start up from a dead stop . . . or negotiate grades and steep hills . . . or pull a trailer or camper . . . or carry a full load of passengers, too much gas feeds into the carburetor and you get incomplete combustion. Every time that happens, it's just like pouring money down the drain (CX 10; *see* CXs 1, 2, 3, 4, 5, 6, 7, 8, 11, 12).

* * * * * * *

GUARANTEED SAVINGS

We firmly believe the Ball-Matic to be one of the best investments you can make to save money this year. The exact saving you will receive may vary significantly depending on the kind of car you drive, the condition of your engine, weather, your driving habits and the amount of driving you do; however we guarantee that you MUST SAVE AT LEAST FIVE TIMES the amount you paid for your BALL-MATIC in the first year or you may return it for a full refund (CX 5; *see* CX 6, 7, 8, 9, 10, 11, 12; *see also* CXs 2, 3, 4 ("double your money back")).

* * * * * * *

Test the BALL-MATIC yourself entirely at our risk. Install it in your own family or company car and if it doesn't deliver everything we say it will—starting with the first tankful, just return it and we'll refund your purchase price (CX 7; *see* CXs 1, 5, 6, 8, 11, 12; *see also* CXs 2, 3, 4, 10 ("double your money")). [13]

CONTROLLED TESTS CONFIRM BIG DOLLAR SAVING

In the Spring of 1978, we arranged for a local Shell Service Station to conduct a controlled, supervised, test using seven different cars owned and driven by non-professional drivers. Each car was fitted with a locked gas cap and the keys kept in the possession of the testers.

After establishing base mileage consumption data for the various cars, the BALL-MATIC was installed and miles-per-gallon figures were re-checked. Every single car in the test showed meaningful improvement.

Make of Car	MPG Improvement
Cadillac Eldorado	21%
Chrysler Imperial	28%
Oldsmobile Cutlass	8%
Chevrolet Vega	10%
Ford Gran Torino	19%
Chevrolet Camero	16%
Cadillac Eldorado	40%

IMPROVEMENT RANGE . . . . 8% to 40% (CX 7; *see* CXs 1-6, 8, 10-12).

* * * * * * *

> Yes, you can actually get up to 70 . . . 80 . . . 90 . . . even 100 extra miles from every single tankful. No matter how old or rundown your car may be . . . no matter how many gallons of gas it now devours each week . . . FROM THE VERY INSTANT YOU INSTALL THE BALL-MATIC GAS SAVER VALVE IN YOUR CAR, YOU MUST EXPERIENCE A DRAMATIC DECREASE IN GAS CONSUMPTION (CX 6; *see* CXs 2, 3, 4, 7, 8, 10, 11, 12). [14]

* * * * * * *

> READ THE RESULTS FOR YOURSELF!
>
> The BALL-MATIC (gas saver) that I purchased has proven itself. I drive a 1970 Oldsmobile, now I get four miles more per gallon.
> C.T.—Orange, California
>
> Just a short note to inform you of the performance of your BALL-MATIC unit that I have installed in my 1972 Ford station wagon. Prior to using your device, I averaged 12 to 13 MPG, now that I have installed your unit my mileage has gone up to 16 MPG around town.
> A. Coutts
> Sherriff, Orange County, California
>
> Before it was installed on my 1973 Ford L.T.D. I was getting 9 miles to the gallon, since installation of the BALL-MATIC I am getting almost 15 miles to the gallon.
> R.B.—Hickman, Nebraska
>
> After installing the BALL-MATIC on my 1972 Oldsmobile Toronado I increased from 7.5 to 10.5 miles to the gallon.
> Seeing this I took my station on as a BALL-MATIC dealer and within the first week sold over 100 valves.
> This kind of extra income producer that other service stations should consider during this energy crisis to service their customers.
> Louis Michaud
> Mobile Service, New Britain, Connecticut
>
> I want to express my thanks for the BALL-MATIC. Since it has been installed in my car, my gas mileage has not been under 18 miles per gallon. This is an increase of 5.5 miles per gallon.
> Rev. R.N. Claremont, California (CX 4; *see* CXs 2, 3, 6, 10; see also CXs 1, 5, 7, 8, 11, 12). [15]

14. In addition to the statements quoted above in Finding 13, *supra*, respondents' advertisements and promotional materials contain a statement that consumers can save fuel "thanks to an amazing automobile discovery" (CXs 2–6, 10; 13–15). Other advertisements describe the Ball-Matic as an "important automobile invention" (CX 7). Many of the advertisements and promotional materials also contain bold type headlines in the text stating that the Ball-Matic is "the Most Significant Automotive Breakthrough of the Last Ten Years" (CXs 2–6, 10, 13–15). Some advertisements liken the Ball-Matic to a "mini-computer brain" (CXs 2–4, 6, 8, 10–12), and in one instance the Ball-Matic is referred to as a "unique, patented" valve (CX 9).

15. Through the above representations set forth in Finding 14,

supra, respondents have represented to the public that the Ball-Matic is an important, significant and unique new invention.

16. Several of respondents' advertisements and promotional materials contain headlines that "EVERY CAR NEEDS ONE". (CXs 1, 5, 15, 17). Many of the respondents' advertisements and promotional materials contain the statement that "every single car owner, every fleet operator, every truck or camper owner . . . can now save up to 20% and more on their gasoline bills" (CXs 2–4, 6, 10, 13–15). Other ads contain the same statement but with the word "can" changed to "may" (CXs 7, 8, 11, 12). In addition, in the "guarantee" contained in most of the advertisements, respondents state that users will save fuel. All of the advertisements and promotional materials include a statement that Volkswagens, diesels, and fuel injection vehicles cannot use the Ball-Matic.

17. Through the statements set forth in Finding 16, *supra*, respondents have represented to the consumer that the Ball-Matic valve is needed on every car except Volkswagens, diesels, and fuel injection vehicles.

18. Most of respondents' advertisements contain the following statement in bold type (CXs 1–8; 10–12): "you experience a significant saving with the very first tankful." Many of the advertisements and promotional materials claim that consumers will "save up to 20% and more" (CXs 1–8; 10–15). A number of advertisements claim that consumers will save up to $200 a year on gas (CXs 6–8; 10–12). Almost all of respondents' advertisements and promotional materials claim that consumers will "get up to . . . 4 extra miles per gallon" (CXs 2–4; 6–15). Other representations contained in these advertisements and promotional materials are: "Get up to . . . 100 extra miles [16] between fill-ups" (CXs 2–4, 6–9; 12–15). Most advertisements report the results of the Shell Service Station test showing savings from 11% to 40% or 8% to 40% (*see* CXs 1–8, 10–15). The consumer testimonials report savings of from 2 to 6 miles per gallon (CXs 1–8, 10–15). Most of the advertisements also describe the type of driving under which the Ball-Matic Valve will effect fuel efficiency and that the actual fuel saving will depend on the type of car driven or the amount of miles driven, the condition of the engine, weather, and driving habits (CXs 1–8; 10–15).

19. Through the claims set forth in Finding 18, *supra*, as well as the lay-out of the advertisements and promotional materials, respondents have represented to consumers that the Ball-Matic Valve, when installed in a typical automobile and used under normal driving conditions, will significantly improve fuel economy.

20. Through the claims set forth in Finding 18, *supra*, as well as the lay-out of the advertisements and promotional materials, respondents

have represented to consumers that under normal driving conditions a typical driver can usually obtain a fuel economy improvement of up to 20% or more or an improvement that will approximate or equal up to four miles per gallon when the Ball-Matic is installed in his or her car.

21. In most of respondents' advertisements and promotional materials, respondents refer to a "controlled, supervised, test" (CX 1-8, 10-15). The text of the advertisement explains that this test (the Orange Hill Shell Service Station test) used seven different automobiles owned and driven by non-professional drivers where each car was fitted with a locked gas cap and the keys were kept in the possession of the testers. The advertisements refer to the results as "dramatic" and contain a chart showing the results for each automobile and representing an overall average gas saving of 18% (*i.e.*, 8 to 40%). Several brochures that do not contain the results of the Orange Hill Shell Service Station test, represent the Ball-Matic Valve as "Tested and Proven up to 20% increase in fuel economy" (CXs 16, 17). Several advertisements and promotional materials refer to "several years of tests to prove the Ball-Matic Gas Saver Valve in the field under actual day-to-day driving conditions" as a preface to the Orange Hill Service Station Test segment of the advertisements (CXs 1, 5, 13-15). One advertisement states "[f]ield tests for over seven years and lab tests at an Accredited Eastern University confirm that the Gas Saver Valve really works" (CX 9). The existence of tests to support the claims made in respondents' advertisements and promotional [17] materials is referred to in the following: "[i]f after reading this ad you still have any doubts whatsoever, just drop [m]e a note and I'll [We'll] gladly forward a copy of my [our] test reports for your inspection" (CXs 1, 3-5, 7, 8, 10, 11, 13-17).

22. Through the representations set forth in Finding 21, *supra*, respondents have represented that competent tests prove the fuel economy claims made for the Ball-Matic Valve.

23. With one exception (CX 9), all of respondents' advertisements and promotional materials feature a black bordered box containing excerpts from consumer testimonials (CXs 1-8, 10-17). This box is captioned "Read the results for yourself." In each testimonial excerpt, the testimonialist reports a significant increase in fuel economy after the Ball-Matic Valve was installed on his or her vehicle. The range of fuel economy improvement reported by the testimonialists is from over 2 miles per gallon to 6 miles per gallon.

24. Through the publication of consumer testimonials including the gas saving claims as set forth in Finding 23, *supra*, respondents have represented that the use of the Ball-Matic Valve by consumers, and

the results reported by them, proves that the device significantly improves fuel economy.

25. The respondents' advertisements and promotional materials for the Ball-Matic Valve do not provide any information concerning when the consumer testimonials were written or whether the testimonialists were currently using the device when the advertising materials were published (*see* CXs 1–8, 10–17). For example, the quotations from the testimonials themselves imply that the testimonialists were currently using the Ball-Matic Valve: C.T. (Clare Thorenson, Orange, California): ". . . now I get four miles more per gallon" (CXs 1–6, 10, 13–17); A. Coutts, (Sheriff, Orange County, California): "now that I have installed your unit . . ." (CXs 1–8, 10–17). The testimonials also imply that permission has been given for their use: A. Coutts: "[j]ust a short note to inform you of the performance of your Ball-Matic" (CXs 1–8, 10–17); Gene Suprenant: "I have recommended the BALL-MATIC to other RV owners . . . (CXs 13–15); B. L. (Billy Largent, Certified Public Accountant, Santa Ana, California): "It gives me great pleasure to express to you my satisfaction" (CXs 1, 7, 13–17).

26. Through the representations set forth in Finding 25, *supra*, respondents have represented that the consumer endorsements in their advertisements and promotional materials are statements of persons who have used the Ball-Matic in the [18] recent past or are currently using the Ball-Matic and who have given permission for the publication of their testimonials.

27. None of the testimonials used in the respondents' advertisements and promotional materials indicate that at the time of their writing, the testimonialists personally knew the manufacturers or various marketers of the Ball-Matic Valve or were connected with them in any way (CXs 1–8, 10–17). The advertisements contain claims that thousands of consumers have purchased the Ball-Matic Valve (*see* CXs 1–5). Moreover, the testimonials used in the advertising and promotional materials are from different cities and different parts of the country (CX 1–8, 10–17).

28. Through the use of testimonials in the manner set forth in Finding 27, along with other representations stated therein, respondents have represented that the testimonials that they used were from individuals independent of all marketers of the Ball-Matic Valve.

29. The consumer endorsement section of the advertisements and promotional brochures contain testimonials from persons living in various parts of the country, driving a wide variety of cars and representing a variety of professions (*e.g.* sheriff, service station owner, accountant, minister) (CXs 1–8, 10–17). In their endorsements, consumers claim the same type of fuel economy improvements from using the Ball-Matic Valve as the respondents do in the text of their

advertisements. For example, the endorsers claim fuel economy improvements ranging from over two to six miles per gallon. These claims are similar to the claims in the narrative text of the respondents' advertising and promotional material that the use of the Ball-Matic Valve can lead to improvements of up to four miles per gallon or up to 20% or more. The endorsers' claims are also similar to the results for the Orange Hill Shell Service Station test reported in the respondents' advertisements (CXs 1-8, 10-17). Moreover, the testimonials are presented in the box captioned "Read the results for yourself" or "Letters we've received" (CXs 1-8, 10-17). Every advertisement and almost all of the promotional materials contain the prominent caption "Over 100,000 already in Use" (CX 1-15). Almost all of the advertising and promotional materials include the statement that "[a]s of now, tens of thousands of motorists all over the country have [installed]" the Ball-Matic (CXs 1-8, 10-15).

30. Through the representations set forth in Finding 29, *supra*, as well as by the overall format of their advertisements and promotional material, respondents have **[19]** represented that the consumer endorsements that they used in their advertisements and promotional materials reflect typical or ordinary experiences of users of the Ball-Matic Valve.

31. As set forth above in Findings 21 and 22, *supra*, respondents represented in most of their advertisements and promotional material that they have test evidence to support their claims as to gas economy to be realized from the use of the Ball-Matic Valve. In addition, the advertisements and promotional material contain many explicit claims that the use of the Ball-Matic can lead to significant fuel savings (*see* Finding 18).

32. Through the use of the claims set forth in Finding 31, as well as the general format of their advertisements and promotional material, respondents have represented that they have a reasonable basis for the claims that they have made.

33. On the basis of the record in this case, it is found that respondents' performance claims for the Ball-Matic Valve as contained in their advertisements and promotional materials and as challenged in the complaint, are false. On the basis of Professor Patterson's engine dynamometer test of the Ball-Matic Valve and the testimony of Professor Patterson and Mr. Korth, it is apparent that under the most favorable conditions for the operation of the Ball-Matic Valve, it cannot effect fuel economy anywhere near "up to 20% or more" or "4 extra miles per gallon".

Professor Patterson's engine dynamometer tests were conducted on a small, 1.3 litre Ford engine that was carbureted at "13.1 to 1" which is considered to be a very rich fuel to air ratio (tr. 392 (Patterson); *see*

CX 99). In an engine dynamometer test the engine is tested independently of the automobile chassis. Although used in certain European model Ford cars, this 1.3 litre Ford engine was not sold in the United States because the engine's emission control system could not meet EPA's 50,000 mile durability requirement and because its fuel economy was relatively low, both deficiencies being attributable to its rich carburetion (tr. 391–92 (Patterson)). Professor Patterson selected this engine for his test in order to maximize the effects of the Ball-Matic Valve and to obtain results that could be qualified and used to determine the effect of the Ball-Matic Valve on typical vehicles on the road in 1979, at the time respondents' advertisements were published (tr. 390–91, 409–10 (Patterson)).

Professor Patterson modeled his test after the tests performed by the Environmental Protection Agency, which uses a [20] chassis dynamometer test. In a chassis dynamometer test the entire vehicle is used, the drive wheels exerting the power to the dynamometer. The EPA procedures are based on an established driving pattern (*see* RX 221E–F). Professor Patterson selected six test points from that pattern which represented approximately 75% of the energy used in the EPA test (tr. 408, 525-26, 547-48 (Patterson)).

Professor Patterson tested two Ball-Matic Valves. The results of the test on Physical CX 115 (a black Ball-Matic Valve containing a relatively weak spring) showed small increases and declines in fuel economy within the test's range of experimental uncertainty and, according to Professor Patterson, these results demonstrated that the Ball-Matic Valve was ineffective as far as fuel economy was concerned (CX 99E, G).

The results of the tests on Physical CX 116 (a silver Ball-Matic Valve containing a relatively stiff spring) showed a measurable change in fuel economy, an average improvement of 6.2 percent in fuel consumption (CX 99F, J; tr. 416 (Patterson)). One test run, which was not reproduced, showed an improvement of 11 percent in fuel consumption (tr. 544 (Patterson)).

34. On the basis of the test results on Physical CX 116, Professor Patterson calculated the effect of the use of this Ball-Matic Valve on vehicles on the road in 1979, considering the general weight of those vehicles and their carburetor settings (tr. 416–17 (Patterson); CX 99S, T, U). He considered that pre-1975 vehicles generally weighed between 4000 and 6000 pounds loaded, whereas vehicles manufactured from 1975 to 1979 were generally lighter, weighing 3000 to 4000 pounds loaded (CX 99). The results of these calculations are set forth at CX 99 J as follows: [21]

Case A represents the 1.3 litre Ford test engine with a 13.1–1 fuel-air

TABLE 2

EFFECT OF GROSS VEHICLE WEIGHT AND WEIGHT/POWER RATIO ON FUEL ECONOMY CHANGE WITH DILUTION PROVIDED BY BALL-MATIC DEVICE

Gross Vehicle Wt (1bm)	2000		3000		4000		5000		6000	
Weight/Power	12.5	25	12.5	25	12.5	25	12.5	25	12.5	25
Case A – 13.1:1	5.2	6.2*	3.5	4.1	2.6	3.1	2.1	2.5	1.7	2.1
Case B – 15.7:1	–2.0	–2.4	–1.4	–1.6	–1.0	–1.2	–.82	–.96	–.7	–.8
Case C – 14.8:1	2.0	2.4	1.4	1.6	1.0	1.2	.82	.96	.7	.8
Case D – 15.5:1	0	0	0	0	0	0	0	0	0	0

* Measured on Ford 1.3 litre engine – U of M Auto Lab.

ratio, Case B represents vehicles manufactured from 1975 to 1979 and Case C represents the vehicles manufactured before 1975 (*see* CX 99 U). Professor Patterson concluded that "the effect on fuel economy [of Physical CX 116] was judged to be both positive and negative with a maximum effect of less than 2% [fuel economy] for vehicles with carburetion typical of today's U.S. vehicle population" (CX 99G). He was of the opinion that the use of the Ball-Matic Valve in actual on-the-road driving would lead to results similar to those that he had calculated in Table 2 (tr. 550 (Patterson)). Dr. Patterson was of the opinion that under a hypothetical situation, where the effects of the Ball-Matic Valve would be maximized, an improvement could be expected of from approximately 2½ percent for a large vehicle to approximately 4 percent for a small vehicle (tr. 496–97 (Patterson)).

35. Mr. Korth testified that EPA has tested or evaluated 14 air-bleed devices, including the Ball-Matic Valve. On older engines carbureted to relatively rich fuel-air ratios, the devices reduced hydrocarbon and carbon monoxide emissions, but did not improve fuel economy (tr. 1050–51 (Korth)). He also testified that, when EPA first started looking into the effect of enleanment on fuel economy and emission, EPA conducted a wide range of engine dynamometer tests and found that enleanment affected emission but did not improve fuel economy in normal operating ranges (tr. 1092–93 (Korth)). A change in fuel economy was obtained when the engine was operating under rich conditions, such as when the carburetor was intentionally [22] altered to enrich the air-fuel mixture. In those situations, EPA found that it was possible to get as much as 5% improvement in fuel economy. These conditions, however, would not represent normal operating conditions (tr. 1092–93).

36. Mr. Korth was of the opinion that the Ball-Matic Valve could not bleed much air into an engine compared to the overall amount of air that the engine uses, especially during heavy acceleration periods when the Ball-Matic Valve is open and admitting air (tr. 1090). He concluded that, given the basic principles of engineering and combustion theory, an air enleanment device such as the Ball-Matic Valve cannot give any significant improvement in fuel economy and that an actual loss in fuel economy could be expected on vehicles operating near the point of best engine efficiency, as in the 1975 to 1979 vehicles (tr. 1090–91).

37. Respondents' representation that "Every car needs one" (except Volkswagens, diesels and fuel injection vehicles) is false. Most of the automobiles manufactured after 1974 have such lean fuel-air mixture setting on their carburetors that no fuel economy could be expected by adding a air-bleed valve to the PCV line (*see* Findings 8–11, 33–36).

38. Respondents' representation that the use of the Ball-Matic Valve would significantly improve fuel economy when installed in a typical automobile and used under normal driving conditions is false. Except in unusual automobiles that are carbureted for rich fuel air mixtures and driven under power conditions (such as "floor boarding") a large portion of the driving time, most automobiles will not experience significant fuel economy from using the Ball-Matic Valve (*see* Findings 8–11, 33–36).

39. Respondents' representation that under normal driving conditions a typical driver could usually obtain a fuel economy of up to 20% or more or an improvement that would approximate or equal four miles per gallon with the Ball-Matic installed in the automobile is false. The record shows that even under the most ideal situations favorable to the Ball-Matic Valve the fuel economy represented by respondents could not be realized (*see* Findings 33–36).

40. The record contains the results of other laboratory tests on the Ball-Matic Valve. In 1976, the EPA performed its test, using standard procedures (now set forth in the Code of Federal Regulations (40 C.F.R. 610)) on a black Ball-Matic Valve (containing a relatively weak spring (tr. 1572 (Stip.)). The EPA test used a 1970 Plymouth Valiant powered by a 225 cubic [23] inch 6 cylinder engine and equipped with an automatic transmission (CX 57C). Based on the test results (*see* CX 57D), EPA concluded that although the Ball-Matic Valve caused reductions in emissions of unburned hydrocarbons and carbon monoxide due to the enleanment of the air-fuel ration and also caused an increase in oxides of nitrogen emission, it had no significant effect upon fuel economy (CX 57E; tr. 1082–84 (Korth)). The EPA's conclusions can be considered quantitatively valid only for the specific type of vehicle used in the chassis dynomometer test; however, similar

results are likely to be achieved on other types of vehicles (CX 57B; tr. 1157 (Korth)).

A test conducted by the Vernon, California Emission Test Laboratory in February 1979, using single runs with a Ball-Matic Valve and without the Ball-Matic Valve on a 1950 Chrysler with automatic transmission obtained a fuel economy of almost 7 percent (*see* RXs 43A, 44).

An Engine dynamometer test conducted by Professor Kishibay at the University of Bridgeport in May 1979 on the Ball-Matic Valve using a V-8 Oldsmobile engine obtained results indicating a range of a .2 to 4.58 percent reduction in fuel consumption for regular gas and a range of 2.64 to 6.01 percent reduction in fuel consumption for high test gasoline (RX 217D).

On August 1 and 2, 1979, a test was performed by Scott Environmental Technology Inc ("Scott") on the Ball-Matic Valve on a 1978 Plymouth Volare equipped with a standard 318 cubic inch V-8 engine with automatic transmission ("Scott Test I"). This was a chassis dynamometer test using the EPA urban cycle with some test runs using modified acceleration rates for hard acceleration (RX 221C, E). The greatest increase in fuel economy measured during this test was 3.9 percent (RX 221J).

On August 22 and 30, 1979, a second series of tests were performed by Scott ("Scott Test II"). The first test was a chassis dynamometer test performed on the 1978 Plymouth Volare (used in Scott Test I) and using the EPA urban test cycle as well as certain portions of that cycle. The results of these tests showed slight increases in fuel economy (RX 225M). The second series of tests, using the same procedures, as in the second test on the Plymouth Volare, were conducted on a 1976 Toyota Corolla equipped with a standard 96.9 cubic inch, four-cylinder engine and a four speed manual transmission. In the first two comparative tests on the Toyota there was a 10.9 percent increase in fuel economy; however, it was suspected that [24] during later tests, which showed no fuel economy, a leak had developed in the manifold vacuum system of the Toyota, which could possibly account for the lack of increased fuel economy (RX 225M).

On September 26 and 27, 1979, an engine dynamometer test was conducted by Automotive Testing Laboratories ("ATL"), East Liberty, Ohio, on the Ball-Matic Valve using a Toyota similar to that used in the second part of the Scott Test II. Unlike other dynomometers used in testing the Ball-Matic Valve, the flywheel loads at ATL were directly coupled to the drive shaft, instead of connected through a system of pullies and belts. Two test runs, one without the Ball-Matic Valve and one with the Ball-Matic Valve obtained an 11.7% increase in fuel economy. Subsequent test runs showed only minor fuel economy, but during those runs there was no drop in manifold vacuum when the Ball-Matic should have opened (CX 87F, K, L; *see* tr. 879–80 (Sussman)).

Although the record contains much debate over the validity of any of these tests, primarily because none of the results which showed fuel economy in the 10 to 12% range could be duplicated, and because the test results were introduced into evidence in this case only as notice to respondents rather than for the truth of the facts reported, it is apparent that no laboratory test indicated that the Ball-Matic Valve, under the most ideal conditions for its operation, would produce the fuel economy represented by respondents in the challenged advertisements and promotional materials.

41. The remaining evidence about the performance of the Ball-Matic Valve consists of fuel economy reports by drivers who had installed the Ball-Matic Valve on their vehicles. With one exception (*see* CX 87A, G), the results reported were not supported by statistical data. Such reports consisted of testimonials of consumers, the experience of individuals involved with the merchandising of the Ball-Matic Valve, and tests referred to as the "Orange Hill Service Station" test and the "Orange County *Register*" test. The results of such tests were obtained by measuring fuel placed in the gasoline tank of the vehicle and noting the change in the odometer reading of those vehicles. These consumers reported fuel economy of up to 20% and over and up to 4 extra miles per gallon, as represented by respondents.

Professor Patterson testified that such consumer tests were not a generally recognized way of testing fuel economy (tr. 393). He was of the opinion that the reproduceability of such [**25**] consumer tests could vary by 20 to 30 percent due to the attitude of the driver and the conditions of the road and the vehicle (tr. 394–96, 550–51). He also testified that measuring fuel consumer by "topping off the tank" is not an adequate control for a fuel consumption test (tr. 577).

Mr. Korth testified that the consumer is not in a position to judge whether a device such as the Ball-Matic Valve works or not (tr. 1064). He considered testimonials essentially meaningless (tr. 1063), and all consumer tests to be invalid. Dr. Wouk did not consider consumer tests, including the Orange Hill Shell Service Station test and the Orange County *Register* test to be scientific tests (tr. 1413, 1428).

The record contains much evidence of the variable in driving habits as well as road and vehicle conditions that can effect fuel economy. By altering driving habits, an individual can effect a fuel saving of as much as 20%. It is possible that a change in air temperature could change fuel economy by 10% or more. The record contains reference to the Hawthorn effect which recognizes that when a person, such as a driver of an automobile, knows he or she is in a test situation he or she will attempt to make the experiment work, in the case of a driver by altering his or her driving habits (*see* tr. 393–96 (Patterson)).

It is found that the so-called consumer tests are not reliable enough to offset the other evidence of record upon which it has been determined that the Ball-Matic Valve will not produce the amount of fuel economy as represented by respondents.

42. It is also found, for the reasons set forth in Finding 41, *supra*, that respondents' use of testimonials to represent performance claims for the Ball-Matic Valve were deceptive. Their representation that the results of consumer usage as evidenced by consumer endorsements proved that the Ball-Matic Valve significantly improved fuel economy was false. Their representation that the consumer endorsements that appeared in advertisements and promotional materials for the Ball-Matic Valve reflect the typical or ordinary experience of members of the public who have used the device, was false.

43. None of the tests relied upon by respondent actually proved the performance claims made for the Ball-Matic Valve. It is found that none of these tests was competent tests. Accordingly, respondents' claim in their advertisements and promotional materials that they had competent tests that proved the fuel economy claims made for the Ball-Matic Valve was false. **[26]**

44. The Ball-Matic Valve was not a "new invention" when respondents marketed it in 1979. It had been marketed since 1973 by the Ball-Matic Corporation (tr. 175–78 (Smith)). Moreover, the evidence also shows that the Ball-Matic Valve was not an important, significant and unique new invention in 1973, when it was first marketed by Ball-Matic Corporation. Devices like the Ball-Matic Valve are commonly called "air bleed" devices (tr. 444, (Patterson); tr. 1139 (Korth); tr. 173 (Smith); CX 99C; RX 244). Such devices have been in existence for many years and the EPA and its predecessor agencies have tested them since 1960 (tr. 1050 (Korth)). The patent for the Ball-Matic Valve covered the fins, not the valve mechanism (tr. 284 (Smith)). Professor Patterson testified that these cooling fins were merely cosmetic and had no effect upon the operation of the Ball-Matic Valve (tr. 378 (Patterson)). Accordingly, also considering the evidence that shows the limit to the effect that some consumers could obtain in fuel economy from using the Ball-Matic Valve, it is found that respondents' representations that the Ball-Matic Valve is an important, significant and unique new invention was false.

45. Except for CX 9, all of respondents' advertisements and promotional materials which are the subject of this proceeding contain consumer endorsements (*see* CXs 1–8, 10–17). Overall there are 18 different endorsements, although only eight different endorsements appear in the advertisements (*see* CXs 1–8, 10–17). Of these 18

testimonials, only six of the individuals are named, respondents having used initials and their town of residence to identify them. The record also contains the testimonial letters of 16 of these testimonialists. There is no dispute that the letters are genuine and reflect the experience that the consumers themselves perceived from the use of the Ball-Matic Valve. Four of the testimonialists were relatives of persons associated with the Ball-Matic Corporation (Robert Ness, son of Al Ness, a Ball-Matic Valve distributor (CX 33; tr. 240–41 (Smith); Ray Barker, brother-in-law of Hugh Harron, Ball-Matic Valve salesman (CXs 31, 134A); Vincent Currieri, nephew of Al Hess (CXs 32, 134A) and Fred Bray, brother-in-law of Al Ness (CX 134B)). One testimonialist was a distributor of Ball-Matic Valves (CX 36 (Michaud)) and one was a salesman for a supplier of the Ball-Matic Corporation (CX 35 (Genoway), CX 134B; tr. 242 (Smith)).

Four of the testimonialists testified and a stipulation relating to another is contained in the record (CX 133 (Thoreson)). [27]

Mr. Michaud testified that he had installed the Ball-Matic Valve on his 1972 Oldsmobile Toronado in 1974. He sold that automobile in 1976 (tr. 940). He currently uses the Ball-Matic Valves in his automobiles (tr. 948, 951). On May 4, 1979, Mr. Michaud signed a form granting Cliffdale permission to use his 1974 testimonial (CX 106; tr. 946).

Mr. Largent testified that he was the accountant for the Ball-Matic Corporation and that in 1974 Mr. Smith installed a Ball-Matic Valve on his automobile (tr. 593–94; *see* tr. 241–42 (Smith)). At the request of Mr. Smith he wrote the testimonial letter (CX 29; tr. 595). He "traded in" that automobile in 1977 (tr. 597). He further testified that it probably occurred to him at the time he wrote the letter that it might be used for promotional purposes and that he would not have objected to its use (tr. 600–01).

Mr. Suprenant testified that he bought a Ball-Matic Valve from the "daughter of the inventor" who was his co-worker and installed it on his Dodge Motor Home in 1974 (tr. 602–04, 610). He wrote a testimonial letter at the request of his co-worker (tr. 606, CX 37). He sold the motor home in 1976 (tr. 609). He gave Cliffdale permission to use his testimonial on May 9, 1979 (CX 93; tr. 608–09).

It was stipulated that Mrs. Thoreson would have testified that she had a Ball-Matic Valve on her 1970 Oldsmobile "98" from 1972 until 1977 when it was sold (CX 133A). She wrote the testimonial at Mr. Smith's request knowing that he was going to use it for promotional purposes (CX 38; CX 133A–B). Mrs. Thoreson never received a request from Cliffdale for permission to use her testimonial in their advertising and promotional material (CX 133B).

Mr. Coutts, an Investigator for the Orange County Sheriff's Office, and who was once a Deputy Sheriff with that office, testified that he purchased a Ball-Matic Valve from Tex Smith in 1974 and had it on his automobile for several months (tr. 619–20). He wrote a letter about the product at Mr. Smith's request (CX 39; tr. 621). In 1979, he became aware of the advertisements in which his testimony appeared (tr. 623). He had never been contacted about permission to use his testimonial in advertising (tr. 624). The use of his name with the title "Sheriff" caused him much embarrassment (tr. 625–27).

46. Most of the testimonials were written in 1973 or 1974. Except for the details related by the four testimonialist [28] witnesses and in the stipulation (*see* Finding 45, *supra*) there is no evidence of record as to the length of time the Ball-Matic Valve was used by these consumers or if the facts related about the Ball-Matic Valve changed over time. However, based on the five reports used in the record, it is found that respondents' implied representation that in 1979 the statements were from persons who had used the Ball-Matic Valve in the recent past was false.

47. Most of the testimonials were solicited or received by Mr. Smith and were given to respondents at the time they were negotiating to become the distributor of the Ball-Matic Valve. From the contents of the letters, and the limited testimony of record, it would appear that the testimonialists either expressly, or at least tacitly, granted Mr. Smith permission to use such testimonials for promotional purposes and respondents' representation that permission was given was not false (*see* tr. 243–44 (Smith)).

48. Although some of the testimonalists were relatives of persons involved in sales or promotion of the Ball-Matic Valve, I find that no evidence that any relationship, involving family or business, was such that makes false respondents' implied representation that the testimonials and the statements contained therein were independently made.

49. In February 1979, Sussman contacted Mr. Tex Smith, the President of the Ball-Matic Corporation, to see if he was still marketing the Ball-Matic Valve (tr. 807–08 (Sussman); tr. 183 (Smith): *see* RX 4). Sussman had learned of that product when he worked at American Consumer Inc. ("ACI"), ACI having marketed the Ball-Matic Valve for a short time in 1978, discontinuing it when the Federal Trade Commission began an investigation of ACI's marketing practices involving the G.R. Valve, another automobile retro-fit device (tr. 806–07 (Sussman); tr. 175, 178, 181, 285 (Smith); *see* CX 41)). [*American Consumer, Inc., et al.,* 94 F.T.C. 648 (1979)] After Smith sent Sussman some material about the product, including some promotional flyers and the results of the Orange Hill Shell Service Station test, Sussman recommended that Koven go to California to meet with Smith (tr.

808–811 (Sussman); tr. 897–98, 903 (Koven); tr.3 11 (Smith); *see* RXs 6A–B, 8, 42A–C).

50. In March of 1979, Koven traveled to California to meet Smith (tr. 899 (Koven); tr. 184–87, 294 (Smith)). At that time Koven signed the marketing agreement with the Ball-Matic Corporation (CX 42; *see* tr. 261–65 (Smith); tr. 902 (Koven)). The contract was actually written on a copy of a draft of a letter agreement between Ball-Matic Corporation and ACI (CX 42). While in **[29]** California, Koven obtained copies of a number of consumer testimonials which he selected from the approximately 100 testimonials that Smith had on file (tr. 907 (Koven); CXs 29–39; RXs 9–40)). Smith also delivered to Koven at that time or by mail shortly thereafter, a reprint of an article by James Brock of the Orange County *Register* (CX 27, RXs 46, 47; tr. 211 (Smith); tr. 907 (Koven)), a copy of the patent for the Ball-Matic Valve (RX 41A–D; tr. 283 (Smith)), and the exemption certificate for the Ball-Matic Valve from the California Air Resources Board (CX 40A–B; tr. 197–99, 304 (Smith); *see* tr. 917 (Koven); tr. 808–09 (Sussman)). Smith showed Koven an evaluation made by the California Air Resources Board dated September 19, 1977, and the result of a test done by a Chrysler laboratory in Vernon, California (tr. 203–07 (Smith); tr. 985–87, 1008 (Koven); RXs 44, 63A-C; *but see* CX 117A-E). Smith and Koven discussed a report by the Department of California Highway Control (CX 61A-B; tr. 218 (Smith); tr. 952, 980 (Koven)). While in California, Koven contacted Mr. Lockwood of the Shell Station and was satisfied that the Shell Service Station test had been conducted as stated in the test report (904, 991 (Koven)). Later, in July 1979, Barnett talked to Brock about the Orange County *Register* article (tr. 907 (Koven); tr. 723 (Barnett); CX 28).

51. In early 1979, Mr. Howard and Mr. Barnett installed Ball-Matic Valves on their private automobiles and reported favorable results (tr. 898–89, 988, 1004, 1018 (Koven)). Barnett obtained a 10 percent improvement or 1½ miles per gallon (tr. 710–17, 721 (Barnett)). Howard obtained 2 miles per gallon increase in fuel economy, from 12 to 14 miles per gallon (tr. 1532–33 (Howard)). Sussman also had experienced an increase in fuel economy from 19.8 miles per gallon to 22.4 miles per gallon by installing the Ball-Matic Valve on his automobile when he worked for ACI (tr. 877 (Sussman)).

52. Respondents relied upon the material received from Smith in the preparation of the two prototype advertisements which contain the representations challenged in the complaint (*see* CXs 1, 2; tr. 924–29, 933–35 (Koven); tr. 818, 884 (Sussman); tr. 351–54 (Smith); tr. 1548–49 (Howard)). The format of the Cliffdale advertisements for the Ball-Matic Valve was similar to the advertising disseminated by ACI for the G. R. Valve (tr. 1480–81, 1538 (Howard); tr. 811–12 (Sussman)).

Respondents also relied upon the experience of their employees who used the Ball-Matic Valve and, later relied on the Kishibay test results which were published May 18, 1979 (tr. 988–89 (Koven); tr. 741 (Barnett); tr. 1548–49 (Howard)). **[30]**

53. When respondents began marketing the Ball-Matic Valve in 1979, they were aware of a November 1978 article in *Consumer Reports* magazine which reported that there were no statistically significant changes in gasoline mileage from use of air-bleed devices such as the Ball-Matic Valve (CX 49A; *see* CX 50; tr. 708–09 (Barnett)). They were also aware of the EPA test on the Ball-Matic Valve (CX 57A-I; tr. 249 (Smith); tr. 919, 981 (Koven)), but had been informed by Smith that the EPA test was not a fair test of the Ball-Matic Valve because it was a dynamometer test and that the Ball-Matic Valve only worked when installed on an automobile and used under actual driving conditions (tr. 252, 334 (Smith); tr. 981 (Koven)). They were also aware of the Federal Trade Commission's investigation of ACI (tr. 900 (Koven)).

54. After preparing "paste ups" of the original advertisements, respondents, pursuant to the requirements of their agreement with Ball-Matic Corporation, submitted copy of the advertisements to Smith in early April 1979 (*see* tr. 349–50 (Smith); tr. 882, 884 (Sussman)). Smith approved the advertising copy without change (*see* RXs 49–53; tr. 882, 884 Sussman)).

55. The first Ball-Matic Valve advertisements disseminated by respondents were published in mid-April 1979 (*see* CX 18).

56. It is found that respondents, at the time they disseminated the Ball-Matic Valve advertisements, did not have a reasonable basis for the economy claims contained therein, as "reasonable basis" is understood for purposes of advertising substantiation under Section 5 of the Federal Trade Commission Act, and that, accordingly, their representation that they had such a "reasonable basis" was false.

57. In the last week of May 1979, respondents secured the services of Dr. Wouk. He reviewed the advertisements already published and suggested numerous changes, most of which were adopted in later advertisements (*see* RXs 230A-C; 231, 232, 235, 236; tr. 746, 749–50 (Barnett)). He advised respondents that consumer testimonials were not a scientific basis for fuel economy claims and recommended that they begin a testing program to corroborate, in a laboratory setting, the fuel economy shown by the consumer tests supplied by Smith (tr. 956 (Koven); tr. 876 (Sussman)).

58. On July 11, 1979, the *Wall Street Journal* carried a front page story on "gas saving devices" which included statements made by the Commission staff as well as by Barnett of Cliffdale **[31]** (RX 244A-B; tr. 775–76 (Barnett)). On or about July 16, 1979, Cliffdale received an investigational subpoena from the Federal Trade Commission relat-

ing to the marketing of the Ball-Matic Valve (tr. 844–45 (Sussman)). About that same time respondents decided to stop advertising the Ball-Matic Valve and attempted to cancel all advertising that had been placed but not published (tr. 956, 975, 1000 (Koven); tr. 1550–51 (Howard); tr. 845, 871, 875 (Sussman)).

59. Respondents' attempt to cancel all advertising for the Ball-Matic Valve was not successful because many magazines had closing dates well in advance of publication and advertisements appeared in many magazines in August, September and October. Only two advertisements appeared in November (CX 18–25; *see* tr. 1491–93 (Howard)). Respondents filled orders placed in response to their advertising until early December when they entered into a settlement with the Post Office Department (*see* tr. 956, 975 (Koven); CXs 45A-J; 67). After that time respondents returned the orders with a letter permitting the consumer to reorder only upon certification that the consumer was not relying upon respondents' advertising claims about the product (CXs 101, 102; tr. 725 (Barnett); tr. 855–56, 870–71 (Sussman)).

60. During the period of his employment by Cliffdale, from May until November 1979, Dr. Wouk conducted research and testing of the Ball-Matic Valve to develop a protocol and test results that would satisfy the government that the valve worked as respondents had claimed (tr. 956, 1000 (Koven)).

61. In all of their advertisements respondents offered a money back guarantee and honored all requests made by consumers for refunds (CX 153D, Item 27 (Stip.)). The Ball-Matic Valves returned to respondents were in turn returned to Ball-Matic Corporation (tr. 330–31 Smith).

62. Although complaint counsel admit that "the exact date on which the spring configuration [from a weak spring to a stiff spring] was made" on the Ball-Matic Valves manufactured by the Ball-Matic Corporation has not been established, they request a finding that it was not until sometime in August 1979 that Ball-Matic Valves containing the "stiff" spring were delivered to Cliffdale (CSCPF Nos. 98, 102). Complaint counsel take the position, and argue throughout their proposed findings, memorandum and reply brief, that the Ball-Matic Valves sold by Cliffdale to consumers from April through July 1979 were ineffective due to the use of a spring that was too weak to permit operation of the valve (*See* CSCPF No. 102). Complaint counsel contend that, accordingly, all of respondents' fuel [32] economy claims for the Ball-Matic Valve disseminated before August 1, 1979, were patently false, not withstanding subsequent laboratory tests on the Ball-Matic Valve with the so-called "stiff" spring which might demonstrate that it does effect some fuel economy.

Respondents argue (Reply Br. p. 24) that this case does not involve any allegation that respondents had shipped a product with an inherent defect and had not honored their money back guarantee, but rather involves the question of whether "the Ball-Matics which respondents sold, assuming they had been manufactured properly, are capable of effecting the fuel savings claimed in the advertisements, and whether respondents had a reasonable basis and reasonable substantiation for the claims in the advertisements".

The parties appear to agree that the "black" Ball-Matic Valve which was manufactured before Cliffdale became a purchaser from the Ball-Matic Corporation had a "weak" and ineffective spring and that "black" Ball-Matic Valves were supplied to Cliffdale for a short time, at the outset of its marketing program, most of them having been returned to the Ball-Matic Corporation. The results of the tests performed on the "black" Ball-Matic Valve (including the EPA test in 1976), which did not demonstrate any fuel economy, have been attributed to the "weak" spring. Tests which ostensibly demonstrated fuel economy including the consumer type tests performed in 1974 were apparently performed on "silver" Ball-Matic Valves which presumably contained a "stiff" spring.

Complaint counsel's contention, that "silver" Ball-Matic Valves delivered to Cliffdale before August 1979 actually contained "weak" springs like the black Ball-Matic Valve, is based on the testimony of Dr. Wouk concerning his visit to the Ball-Matic Corporation's product quality control facility in California and his observations during the first Scott test, as contained in his recommendation, among others, that a stiffer spring be used on the Ball-Matic Valve (tr. 1214–15, 1427 (Wouk); CXs 75, 80).

The significance of the "weak" spring in the so-called "black" Ball-Matic Valve was not developed before the hearings and the possible difference in the "springs" in the "silver" Ball-Matic Valve was not developed until after the hearings. It is not clear whether Dr. Wouk's concerns in September 1979 related to development of a Ball-Matic Valve that would admit air into the engine in amounts necessary to theoretically achieve the fuel economy claimed in the advertisements, rather [33] than to insure that the Ball-Matic Valve was not "defective". In my opinion, Dr. Wouk was suggesting the possible use of a "stiffer" spring and not that the valve was inherently defective.

In the circumstances, complaint counsel's proposed finding that Ball-Matic Valves with the "stiff" spring were not sold by Cliffdale until August 1979 is rejected and for purposes of this case it is found that the silver Ball-Matic Valves which were delivered to Cliffdale soon after the start of the Cliffdale marketing program were manufactured properly.

63. Respondents request findings that they are not responsible for

any misrepresentations that may be adjudicated on the basis of the advertisements and promotional materials challenged in this case because they relied solely on information supplied to them by the manufacturer and supplier of the Ball-Matic Valve. In this respect they point out that they had obtained specific approval of such advertising claims from the supplier and from Dr. Wouk, an eminent scientist. They also note that the Commission issued a complaint against the Ball-Matic Corporation covering the identical advertisements challenged in this docket, and has issued an order to cease and desist against the Ball-Matic Corporation.

The record shows that Koven and Sussman prepared the challenged advertisements and promotional material and were responsible for its dissemination. Howard, an employee of Cliffdale, selected certain testimonials for inclusion in the advertisements and prepared the "lay out" of the advertisements. Koven and Sussman also planned the marketing of the Ball-Matic Valve and dictated the operations of both Cliffdale and Sherwood in marketing the product.

Whatever responsibility Smith and the Ball-Matic Corporation may have had in supplying information, approving the advertising copy or supplying the means for respondents advertising claims and marketing program does not lessen respondents' responsibility for their own actions.

Finally, Dr. Wouk's approval of the advertising copy, after it had been disseminated, does not lessen respondents' legal responsibility under Section 5 of the Federal Trade Commission Act. The requested finding that respondents were not responsible for the challenged practices is rejected.

64. Respondents contend that Professor Patterson's test should be disregarded (RPF No. 90). They argue that his test does not fairly reflect typical drivers, typical automobiles and typical [**34**] driving conditions. They point out that Professor Patterson used an engine which is not used in automobiles manufactured in the United States, that he employed an engine dynomometer instead of the chassis dynamometer used by the EPA, that he varied the test points of the EPA test, and that he used a set of test points that were for a different engine than the one he used in his test of the Ball-Matic Valve. They argue further that if the numerous field tests, consumer usage reports and other data they relied upon, including the Kishibay chassis dynamometer test, are not reliable because, as complaint counsel contend, they do not fairly reflect typical driving conditions, then the Patterson test is not reliable for the same reasons.

The record shows that consumer type tests should not be used to support fuel economy claims because there are so many variables that can effect differences in fuel consumption that it is impossible to determine whether changes in fuel consumption are attributable to the variable being tested, here the installation of the Ball-Matic Valve. Engine dynamometer tests, such as Professor Patterson's test, eliminate all other variables. Accordingly, such laboratory testing is more reliable than consumer type testing, notwithstanding that extrapolations of such test results to the results that any single individual may experience under actual driving conditions would not be expected to be entirely accurate.

Professor Patterson's laboratory test demonstrated that under conditions most favorable to the operation of the Ball-Matic Valve, the maximum benefit any vehicle could experience would be far less than the maximum claimed in respondents' advertising and promotional materials. In the absence of any non-consumer test to the contrary, Professor Patterson's test is the best evidence. In fact, all laboratory tests confirm Professor Patterson's results. Respondents' request that Professor Patterson's test and his accompanying testimony be disregarded is denied.

65. Respondents contend (*see* RPF, pp. 3, 61, 62) that insofar as the complaint alleges that respondents are *now* engaged in the practices challenged therein, it must be dismissed because they have not engaged in any advertising for the Ball-Matic Valve since 1979, and have not sold any Ball-Matic Valves since early in 1980. I agree. That portion of the complaint issued July 7, 1981, that alleges that respondents were then currently engaged in the challenged practices is dismissed for failure of proof (Complaint ¶¶ 2, 5, 9, 10, 11). [35]

DISCUSSION

The Federal Trade Commission has jurisdiction over Cliffdale, Koven and Sussman. They are engaged in commerce within the meaning of the Federal Trade Commission Act, and the challenged acts and practices are in commerce and affect commerce within the meaning of the Act. Respondents' contentions that the Commission lacks jurisdiction over them or the subject matter of the complaint or that the complaint fails to state a claim against them upon which relief can be granted, as pleaded in their answer, must be rejected.

It has been found that the advertisements contained the representations alleged in the complaint. This determination has been made from carefully considering the advertisements, including the format and the emphasis placed on certain words and phrases contained therein. It is well settled that the meaning of an advertisement may be determined by an examination of the advertisement itself. *See Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374

(1965); *J. B. Williams Co., Inc.* v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

It has been found that respondents' advertising representations as contained in their advertisements and as alleged in the complaint are, with several minor exceptions, false. This determination has been made on the facts of this record as set forth in the findings of fact. It is well settled that any advertising representation that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice which violates the Federal Trade Commission Act. *Chrysler Corp.* v. *Federal Trade Commission*, 561 F.2d 357, 363 (D.C. Cir. 1977); *Charles of the Ritz Distr. Corp.* v. *Federal Trade Commission*, 143 F.2d 676, 679–80 (2d Cir. 1944).

Determination as to whether an advertiser possessed and relied upon a "reasonable basis" for believing a representation to be true requires evaluation of "both the reasonableness of an advertiser's action and the adequacy of the evidence upon which such actions were based" *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972). The basic question is whether the advertiser "acted upon information which would satisfy a reasonable prudent businessman" that the representations are true and that he thus acted in "good faith". *National Dynamics Corp.*, 82 F.T.C. 488, 553, 557.

Although the record is clear that the materials relied upon [36] by respondents as basis for the performance claims made for the Ball-Matic Valve were merely consumer type tests and reports which should not form the basis for fuel economy claims, the question of the respondents' reasonableness in relying upon such material should be considered as a factual matter apart from the adequacy of the materials themselves. The record shows that there were materials available to respondents before and at the time that they published the first advertisements which indicated that the value of the Ball-Matic Valve and other such "air bleed" devices for effective fuel economy was limited. Respondents should have made further investigation into the matter instead of merely relying on the consumer tests. The steps which they took to become informed occurred after the publication of the challenged advertisements.

In support of their contention that respondents' represented that they had competent, scientific tests to support their performance claims for the Ball-Matic Valve, complaint counsel point to the statements in the advertisements about the Shell Service Station Test. In their advertisements, respondents detailed how the test was conducted and the results thereof. In support of their contention that respondents falsely represented that they had scientific tests to support their performance claims for the Ball-Matic Valve, complaint counsel argue, based on the expert testimony of record, that consumer type tests such as the Shell Service Station test, are not scientific tests. Respondents question complaint counsel logic, arguing that if the test as detailed in the advertisement is not a scientific test, it could not be an implied representation that it is. I agree with respondents. But there are other representations in each advertisement that can be interpreted as representing that such scientific tests supporting the claims did exist, whereas, as the record shows, none did.

Respondents contend that statements attributed to others containing only initials of the testimonialist and no other identifying personal characteristic are not testimonials and not governed by the Federal Trade Commission's guidelines concerning endorsements and testimonials (16 C.F.R. 255.1 (1982)).

In my opinion, respondents are correct, because the Guidelines appear to be directed at protecting the privacy of the testimonialist. Initials are not such identifying material, without more, to bring the Guidelines into operation.

Complaint counsel's contention that respondents must get direct permission from each testimonialist before they can use their statements in advertising, even though, as found in this [37] case, the testimonialists gave Mr. Smith such permission, must be rejected. Such a general proposition restricts a seller from permitting a buyer to use testimonials in the resale of products. It is sufficient that the buyer be assured that permission has been granted. The Coutts situation, which is the only matter of record where there is a question of whether permission was granted to Mr. Smith, really involves the misuse of the title "Sheriff". This one situation, where respondents did, in good faith, understand from Mr. Smith that permission was granted, is not sufficient, in my opinion to support a finding of an unfair and deceptive practice or an unfair method of competition or to support a general prohibition in an order to cease and desist.

Although it appears that the Guidelines were substantially amended in January 1980, and may not be directly applicable to this proceeding, the Commission, could, nevertheless invoke Section 5 of the Federal Trade Commission Act to find certain practices unfair and deceptive. But where the Guidelines limit or define certain practices that will be considered unfair, those practices apparently permitted by the Guidelines should not be the subject of adjudicative proceedings.

In this respect, I do not think that the undisclosed relationships between certain testimonialists quoted in respondents advertising and the marketers of the Ball-Matic Valve are the type of relationships which might affect the weight or credibility of the endorsement so as to invoke the requirement that such relationships be fully disclosed.

Finally, respondents contend that this entire proceeding, including any order to cease and desist, is not in the public interest. They show that they ceased their advertising as soon as questions arose as to the merits of the Ball-Matic Valve, that they attempted to cancel advertising already placed, that the Post Office has an outstanding consent order against them, and that there is no possibility that they will again publish advertisements about the Ball-Matic Valve. They argue that their entire endeavor was short-lived and was undertaken and terminated in good faith. In this respect, respondents emphasize the matters challenged in this case took place in 1979, and that they voluntarily started to terminate their business in the Ball-Matic Valve before the Federal Trade Commission investigation and did terminate their business in the Ball-Matic Valve more than a year before the complaint issued (*see* RPF pp. 91–94; Resp. Reply Br. 37–38). **[38]**

In my opinion, respondents' actions do not bar the Commission proceeding as a matter of law. The violations of Section 5 of the Federal Trade Commission Act took place. The Commission has the responsibility to seek an order to cease and desist against the use of unfair and deceptive practices, such as false fuel economy claims and misuse of testimonials, in the future. The fact that respondents *will* never sell Ball-Matic Valves again is not relevant. The record shows that respondents are still in the mail order business.

Moreover, there is nothing improper in the Commission's proceeding under Section 5 of the Federal Trade Commission Act in areas already covered by Post Office Department orders. There are many basic and material differences in the laws administered by the two public agencies. *See Reilly* v. *Pinkus*, 338 U.S. 269, 277 (1949); *Damar Products, Inc.*, 59 F.T.C. 1263 (1961), aff'd. *Damar Products, Inc.* v. *Federal Trade Commission*, 309 F.2d 323 (3d Cir. 1962).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Cliffdale, Koven and Sussman.

2. This proceeding is in the public interest. The Commission so determined upon the assumption of jurisdiction through the issuance of the complaint. *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 83 (1956): Nothing in the record of findings requires a different determination. *See Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929).

3. The individual respondents formulated, directed and controlled the acts and practices of the corporate respondent and other entities

of which they were officers or employees, including the acts and practices found herein, and are responsible, individually for such acts and practices.

4. Respondents have disseminated unfair, false, misleading and deceptive advertisements and sales promotional materials in the promotion, marketing and sale of the Ball-Matic Valve and the respondents' advertisements and sales promotional material constitute "false and deceptive" advertisements as those terms are defined in the Federal Trade Commission Act.

5. At the time respondents made the false representations about the fuel economy that could be expected to result from use of the Ball-Matic Valve, they did not possess a "reasonable basis" on which to make such claims. Failure to have such a **[39]** "reasonable basis" is a violation of Section 5 of the Federal Trade Commission Act.

6. Respondents' dissemination of such false and deceptive advertisements had the tendency and capacity to mislead and deceive the public and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce or affecting commerce in violation of the Federal Trade Commission Act.

REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to insure discontinuance of the unlawful practices found. *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 613 (1946); *Warner-Lambert Co.* v. *Federal Trade Commission,* 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978); *Niresk Industries Inc.* v. *Federal Trade Commission,* 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied,* 364 U.S. 883. The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past and may close all roads to the prohibited goal. *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470 473 (1952); *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419 (1957).

Complaint counsel's proposed order is identical to the notice order that accompanied the complaint. Except for the two provisions relating to challenged representations concerning the testimonials that I have found not to be false on the basis of this record, and the scope of one of the ministerial provisions of the proposed order, the proposed order is "reasonably related" to the violations found and meets the requirements of the case law.

Respondents challenge Part II of the proposed order as presenting them with an impossible situation. They contend that if they rely upon an engine dynamometer test, as complaint counsel relied on Dr. Patterson's test, they could not use it as support for fuel economy claims because the order requires either an appropriate EPA test chassis dynamometer test or an appropriate track test. They also contend that if they used an EPA chassis dynomometer test they would still be precluded from using the test results for advertising because, as is reflected [40] on the record in this case, such results cannot be represented as being achievable by typical drivers under typical conditions, such results being useful only for comparative purposes as between cars of different manufacture.

I do not read the proposed order as being so restrictive. The record shows that there are procedures for testing retro-fit devices or other fuel saving devices such as additives which require "before" and "after" test results for comparisons (*see* CX 57B; n. 1; RX 227). The tests described in the order are examples. The point of the order is to require respondents to have a reasonable basis for fuel economy claims founded on "a competent and reliable test that is one in which persons qualified to do so conduct the test and evaluate its results in an objective manner using procedures that insure accurate and reliable results" (*see* Part II, order *infra* p. 43). I do not agree with respondents that the tests detailed in the proposed order would be less of a reasonable basis for substantiation of fuel economy representations than the consumer type tests upon which they did rely.

I agree with respondents that Part IV of the order must be limited to "gas saving products". To require the file retention of post-purchase materials of all advertised products is beyond the scope of this case and would impose an undue burden on respondents.

Part VII of the order, which requires respondent to notify the Commission, for a period of 10 years, of the discontinuance of any past employment and affiliation with any new business, is entirely proper.

Order

PART I

It is ordered, That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection [41] with the advertising, offering for sale, sale or distribution of the automobile retrofit device variously known as the Ball-Matic, the Ball-Matic Valve, the Ball-Matic Gas Saver Valve and the Gas Save Valve, or of any other automobile retrofit device (as "automobile retrofit device" is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011) having substantially similar properties, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. representing, directly or by implication, that such device is a unique product or new invention; and

b. representing, directly or by implication, that such device is needed on every vehicle except Volkswagens, diesel vehicles and fuel injection vehicles. [42]

PART II

It is further ordered, That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, and its officers, and Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile gasoline additive, engine oil additive, or automobile retrofit device (as "automobile retrofit device" is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011), in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless, and only to the extent, respondents possess and rely upon a reasonable basis which substantiates such representation at the time of its initial and each subsequent dissemination. This reasonable basis shall consist of competent and reliable tests, such as:

a. chassis dynamometer tests done according to procedures that simulate typical [43] urban and highway driving patterns, such as the then current urban and highway driving test schedules established by the Environmental Protection Agency; or

b. track or road tests done according to procedures that simulate urban and highway driving patterns, such as the then current procedures established in the Society of Automobile Engineers' J1082b test protocol.

A competent and reliable test means one in which persons qualified to do so conduct the test and evaluate its results in an objective manner using procedures that insure accurate and reliable results.

Respondents shall, when using the results of any tests required by this Part, clearly and conspicuously disclose any limitations upon the applicability of the results to any automobile, truck, recreational vehicle, or other motor vehicle. Where the results of such tests are used in connection with a representation of fuel economy improvement expressed in miles per gallon (or liter), miles per tankful, or percentage, [44] or where the representation of the benefit is expressed as a monetary saving in dollars or percentages, all advertising and other sales promotional materials that contain the representation must also clearly and conspicuously disclose the following disclaimer: "REMINDER: Your actual saving may vary. It depends on the kind of driving you do, how you drive and the condition of your car."

PART III

It is further ordered, That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, and its officers, Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. using, publishing, or referring to any endorsement unless respondents have good reason to believe that at the time of [45] such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained;

b. representing, directly or by implication, any energy savings or energy consumption characteristics of any product, other than any gasoline additive, engine oil additive, or automobile retrofit device (as "automobile retrofit device" is defined in the Automobile Information and Cost Savings Act, 15 U.S.C. 2011), unless, at the time of making the representation, respondents possess and reasonably rely upon competent and reliable evidence that substantiates such representation;

c. representing, directly or by implication, that any consumer endorsement of a product or service represents the typical or ordinary [46] experience of members of the public who use the product unless this is the case;

d. misrepresenting, in any manner, the purpose, procedure, results, or conclusion of any test or survey pertaining to the energy saving or energy consumption characteristics of any product.

PART IV

It is further ordered, That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, and its officers, and Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any fuel saving product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain accurately the following records which may be inspected by Commission staff members upon fifteen (15) days' [47] notice: copies of dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; documents relating to the use or publication of endorsements; records of the number of pieces of direct mail advertising sent in each direct mail advertisement dissemination; documents which substantiate, contradict, or otherwise relate to any claim which is a part of the advertising, sales promotional materials, or post-purchase materials disseminated by respondents directly or through any business entity. Such documentation shall be retained by respondents for a period of three (3) years from the last date any such advertising, sale promotional materials, or post-purchase material is disseminated.

PART V

It is further ordered, That the corporate respondent shall forthwith distribute a copy of this order to all operating divisions of said corporation, and to all present and future personnel, agents, or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order and that the corporate respondent shall secure from each such person a signed statement acknowledging receipt of the order. [48]

PART VI

It is further ordered, That the corporate respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

PART VII

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with each new business or employment for a period of ten years from the effective date of this order. Each such notice shall include the respondents' new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [49]

PART VIII

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, and also one (1) year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Opinion of the Commission

By Miller, *Chairman:*

Cliffdale Associates, Jean-Claude Koven, and Arthur N. Sussman were charged with unfair methods of competition and unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act.[1] Specifically, the complaint charged that respondents misrepresented the value and performance of an automobile engine attachment known as the Ball-Matic Gas Saver Valve ("Ball-Matic"). (Complaint ¶¶ 5,6.) The complaint also charged that respondents lacked a reasonable basis [2] for their performance claims for the Ball-Matic. (Complaint ¶¶ 7, 8.)

Administrative Law Judge Miles J. Brown held that respondents had engaged in false and deceptive advertising and had lacked a reasonable basis for the claims made in their advertisements and promotional materials, in violation of Section 5 of the FTC Act. (ID 38–9.)[2] Both sides appeal from the ALJ's initial decision. We generally

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[1] 15 U.S.C. 45.

[2] The following abbreviations are used in this opinion:

ID - initial decision page number
IDF - initial decision finding number
Tr. - transcript of testimony page number
CX - complaint counsel's exhibit number
CAP - complaint counsel's appeal brief page number
CAB - complaint counsel's answering brief page number

(footnote cont'd)

agree with the ALJ's findings and conclusions and, except as noted in this opinion, we adopt them as our own.

I. BACKGROUND

A. *The Respondents*

1. Cliffdale Associates

Cliffdale is a Connecticut corporation headquartered in Westport, Connecticut. The company is engaged in mail order marketing of different products, including the Ball-Matic. Company sales for the year ending December 31, 1979, were $692,998.

2. Jean-Claude Koven and Arthur N. Sussman

Jean-Claude Koven and his wife own 100% of Cliffdale's [3] stock. Koven has been president of the company since its incorporation. He directed the marketing and advertising activities of Cliffdale and shared the administrative duties with his wife. Koven has been engaged in a number of mail order businesses since 1970.

Arthur N. Sussman has been involved in various mail order businesses since 1971. Sussman was a consultant to Cliffdale from January 6, 1979, to July 1, 1979. Sussman was to find new products to be sold by Cliffdale, and it was Sussman who brought the Ball-Matic to the company. Both Koven and Sussman were actively involved in marketing the Ball-Matic and were responsible for placing the advertisements at issue in this proceeding.

B. *The Product*

The Ball-Matic was marketed as a gasoline conservation automobile retrofit device. The Ball-Matic is one of a number of "air bleed" devices designed to allow additional air to enter a car's engine in order to improve gasoline mileage.[3]

C. *The Allegations*

The complaint charges respondents with ten law violations arising from their placement of advertisements and distribution of sales materials that made false and misleading claims concerning the performance and value of the Ball-Matic. The charges can be divided into four classes. [4]

a. The first class relates to claims descriptive of the Ball-Matic and its performance. The claims are:

CMF- complaint counsel's memorandum supporting proposed findings of fact and conclusions of law page number

RX - respondents exhibit number

[3] A more detailed discussion of air bleed devices can be found at IDF 8-11.

1. the Ball-Matic is an important, significant, and unique new invention;
2. the Ball-Matic is needed on every motor vehicle except Volkswagens, diesel vehicles, or fuel injected vehicles;
3. the Ball-Matic, when installed in a typical automobile and used under normal driving conditions, will significantly improve fuel economy; and
4. under normal driving conditions, a typical driver can usually obtain a fuel economy improvement of 20 percent (or more) or an improvement that will approximate or equal four miles per gallon when the Ball-Matic is installed in an automobile.

(Complaint ¶5.)

b. The second class arises from respondent's claims that competent scientific tests establish the fuel economy claims made for the Ball-Matic. (*Id.*)

c. The third class relates to the use of consumer endorsements that appeared in ads and sales materials. According to the complaint, the advertisements represented that the endorsements:

1. prove that the Ball-Matic significantly improves fuel economy;
2. were obtained from individuals or other entities who, at the time of providing their endorsements, were independent from all of the individuals and entities that have marketed the Ball-Matic;
3. are statements of persons who have recently used or are currently using the Ball-Matic; and
4. reflect the typical or ordinary experience of members of the public who have used the Ball-Matic.

(*Id.*) **[5]**

d. Finally, the complaint charges that respondents lacked a reasonable basis for making the advertised performance claims for the Ball-Matic. (Complaint ¶8.)

D. *The Issues Raised on Appeal*

The ALJ held that respondents' claims constituted unfair or deceptive acts or practices and entered an order requiring respondents to cease and desist from making them unless they have a reasonable basis for such claims. Pursuant to the order, a reasonable basis must consist of competent empirical tests, such as chassis dynamometer tests or road tests, performed under established test protocols. The ALJ also prohibited respondents from making misrepresentations through consumer endorsements in future advertisements.

Respondents appeal from the ALJ's findings as to liability, submitting their proposed findings of fact and law as their appeal brief. Complaint counsel appeal from the ALJ's holding that respondents' failure to disclose their relationship to endorsers of the product was not deceptive. Complaint counsel also appeal from the ALJ's decision not to require retention of certain business records to insure compliance with the order. Finally, complaint counsel appeal from a number of specific ALJ findings, that they believe inadequately address the nature of respondents' conduct.

With respect to complaint counsel's appeal from specific findings of the ALJ, except as noted in the opinion below, we reject all but their proposed finding Nos. 45 (a), (b), and (c), which correct erroneous record citations and tabulations by the **[6]** ALJ. We also reject complaint counsel's appeal with respect to the retention of business records. We agree with the ALJ that such a requirement would impose an undue burden on respondents. (ID 40.)

At trial, the charge of unfair methods of competition was not specifically addressed. The ALJ ruled there was liability but made no separate findings supporting this conclusion. Our review of the record reveals that it does not contain sufficient evidence to support a finding of liability on this charge. Accordingly we reverse those portions of the ALJ's decision that relate to unfair methods of competition, and dismiss that count of the complaint. We reject all of respondents' other contentions.

II. LEGAL STANDARD FOR DECEPTION

The complaint pleads both an unfairness and a deception theory for each alleged violation of Section 5. (Complaint ¶¶ 6, 7, 8, 11.) However, deception was the standard under which the claims were actually tried, and it is the Commission's view that this was the appropriate approach.

In finding the representations in respondents' advertisements to be deceptive the ALJ accepted complaint counsel's articulation of the standard for deception. He concluded that "any advertising representation that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice which violates the Federal Trade Commission Act." (ID 35, citing *Chrysler Corp. v. FTC,* 561 F.2d 357, 363 (D.C. Cir. 1977); *Charles of the Ritz* [7] *Distributors Corp. v. FTC,* 143 F.2d 676, at 679–80 (2d Cir. 1944).) We find this approach to deception and violations of Section 5 to be circular and therefore inadequate to provide guidance on how a deception claim should be analyzed. Accordingly, we believe it appropriate for the Commission to articulate a clear and understandable standard for deception.

Consistent with its Policy Statement on Deception, issued on October 14, 1983,[4] the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material. These elements articulate the factors actually used in most earlier Commission cases identifying whether or not an act or practice was deceptive, even though the language used in those cases was often couched in such terms as "a tendency and capacity to deceive".[5]

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[4] Commission letter on deception to Hon. John D. Dingell, Chairman, Subcommittee on Oversight and Investiga-

(footnote cont'd)

The requirement that an act or practice be "likely to mislead", for example, reflects the long established principle that the Commission need not find *actual* deception to hold that a [8] violation of Section 5 has occurred.[6] This concept was explained as early as 1964, when the Commission stated:

> In the application of [the deception] standard to the many different factual patterns that have arisen in cases before the Commission, certain principles have been well established. One is that under Section 5 actual deception of particular consumers need not be shown.[7]

Similarly, the requirement that an act or practice be considered from the perspective of a "consumer acting reasonably in the circumstances" is not new. Virtually all representations, even those that are true, can be misunderstood by some consumers. The Commission has long recognized that the law should not be applied in such a way as to find that honest representations are deceptive simply because they are misunderstood by a few.[8] Thus, the Commission has noted that an advertisement would not be considered deceptive merely because it could be "unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the [9] representation is addressed."[9] In recent cases, this concept has been increasingly emphasized by the Commission.[10]

The third element is materiality. As noted in the Commission's policy statement, a material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product. Consumers

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tions, Committee on Energy and Commerce, October 14, 1983, hereinafter cited as "DS". The letter to Chairman Dingell is attached as an appendix to this opinion.

[5] *Sears Roebuck and Co.*, 95 F.T.C. 406 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982).

[6] *See generally*, DS 4–7 and cases cited therein for a more detailed discussion of the "likely to mislead" principle.

[7] Statement of Basis and Purpose, *Cigarette Advertising and Labeling Rule*, p. 84, 29 FR 8324 (1964).

[8] *Heinz W. Kirchner*, 63 F.T.C. 1282 (1963). However, if there is an affirmative showing that a representation or practice is directed at a distinctive target group, the Commission will determine the effect of the representation on a reasonable member of that group. *Ideal Toy Co.*, 64 F.T.C. 297, 310 (1964). *See* DS 7–14.

[9] *Heinz W. Kirchner*, at 1290.

[10] *See, e.g.*, *American Home Products*, D. 8918 (1981) [98 F.T.C. 136]; *Sterling Drug*, D. 8919 (July 5, 1983) [102 F.T.C. 395]; *Bristol-Myers*, D. 8917 (July 5, 1983) [102 F.T.C. 21], appeal docketed, No. 83-4167 (2d Cir. Sept. 12, 1983). This concept also is discussed at DS 7–15 and the cases cited therein.

thus are likely to suffer injury from a material misrepresentation.[11] A review of past Commission deception cases shows that one of the factors usually considered, either directly or indirectly, is whether or not a claim is material.[12]

Although the ALJ in this case used the phrase "tendency and capacity to deceive" in his initial decision, we find after reviewing the record that his underlying analysis shows that the three elements necessary for a finding of deception are present in this case.

III. THE QUESTION OF LIABILITY

The obvious first step in analyzing whether a claim is [10] deceptive is for the Commission to determine what claim has been made. When the advertisement contains an express claim, the representation itself establishes its meaning.[13] When the claim is implied, the Commission will often be able to determine the meaning through an examination of the representation, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction.[14] In other situations, the Commission will require extrinsic evidence that reasonable consumers interpret the implied claims in a certain way.[15] The evidence can consist of expert opinion, consumer testimony, copy tests, surveys, or any other reliable evidence of consumer interpretation. In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.[16] [11]

A. *Descriptive Claims*

1. Important New Invention

a. *Were the Claims Made?*

Most of respondents' advertisements refer to the Ball-Matic as an "amazing automobile discovery." (CX 2–6, 10, 13–15.) The same advertisements also describe the product as "the most significant automotive breakthrough in the last ten years." Other ads term the Ball-Matic an "important automobile invention" and a "unique, patented" valve. The Ball-Matic is even compared to a "mini-computer brain." (CX 2–4, 6, 8, 10–12.)

The ALJ found these advertisements expressly claim that the Ball-

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[11] The policy statement specifically recognized that an act or practice need only be likely to cause injury to be considered deceptive. Actual injury is not required. DS 16.

[12] *American Home Products; Ford Motor Co.*, 84 F.T.C. 729 (1974) (consent), *modified*, 547 F.2d 954 (6th Cir. 1976), *reissued*, May 16, 1977 (slip opinion). *See* Statement of Basis and Purpose, *Cigarette Advertising and Labeling Rule;* DS 15.

[13] *Bristol-Myers, Sterling Drug.*

[14] *Bristol-Myers; National Dynamics*, 82 F.T.C. 488, 548 (1972), *aff'd*, 492 F.2d 1333 (2d Cir.), *cert denied*, 419 U.S. 993 (1974).

[15] *E.g., Pfizer, Inc.* 81 F.T.C. 23, 59 (1972); *Sears, Roebuck & Co.*, 95 F.T.C. 406, 510–11 (1980).

[16] *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 588 (D.C. Cir. 1970).

Matic is an important, significant, and unique new invention (IDF 15.) We agree.

b. *Needed in Every Car*

Respondents' advertisements also state that "EVERY CAR NEEDS ONE."(CX 1, 5, 15, 17.) Most ads state that each and every car owner, truck owner, etc. can save up to 20 percent in gasoline costs by using the Ball-Matic. (CX 2–4, 6, 7, 8, 10, 11, 12–15.) All of the advertisements and promotional materials include a disclaimer that Volkswagens, diesels, and fuel injected vehicles cannot profit from the Ball-Matic. As the ALJ concluded, these are express claims and their meaning is clear from the ads themselves.

c. *Enhanced Efficiency*

The alleged claims for "significant" fuel economy and specific levels of improvement are less direct. Most of respondents' advertisements state that consumers will "get up to [12] . . . four extra miles per gallon," or "up to . . . 100 extra miles between fillups." (CX 2–4, 6–9, 12–15.) The ads claim that significant savings will start with the first tankful. (CX 1–8, 10–12.) Savings of up to 20 percent and more are promised. (CX 1–8, 10–15.) Other advertisements present test results claiming savings of 8 to 40 percent or provide consumer testimonials of savings from 2 to 6 miles per gallon. (CX 1–8, 10–15.)

We find, as did the ALJ, that respondents expressly claimed a "significant improvement of fuel economy" and that under normal driving conditions a typical driver could usually obtain a fuel economy improvement of 20 percent (or more) or an improvement that would approximate four miles per gallon. (IDF 19.) We do not conclude that a consumers would interpret these ads as claiming a specific fuel savings from use of the Ball-Matic.[17] Nor do we conclude that consumers would believe that by using the Ball-Matic they would be assured of savings close to the higher end of the spectrum. We do find that a consumer would be reasonable in expecting the average savings from the Ball-Matic to be within the stated range, and, together with the claims of universal applicability of the device, expect the variance from that average to be relatively small.

2. Were The Claims Deceptive?

[13] Having determined that respondents made the claims as charged, we must next determine whether the claims were false in a material respect, and thus likely to injure consumers.

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[17] Evidence as to how consumers actually interpreted these advertisements was not introduced into the record. While such evidence would have been useful, the Commission believes it can, in this case, interpret the claims as a reasonable consumer would have.

a. *Ball-Matic as an Important New Invention*

The evidence presented at trial amply documented that the Ball-Matic is a simple air-bleed device similar to many other such devices that have been marketed over the years. Clearly the Ball-Matic is not new. In fact, the Commission has already issued cease and desist orders against various marketers of two such devices, the Albano Air Jet and the G.R. Valve, both of which are virtually identical in design to the Ball-Matic.[18] Air-bleed devices have been around a long time and, as the ALJ found, are considered to be of little value by the automobile industry.

The claim that the Ball-Matic was a new invention was expressly made. Having found such a claim to have been made, and that the claim is false, the Commission may infer, within the bounds of reason, that it is material.[19] We therefore conclude that the ALJ was correct in holding that this claim was deceptive.

b. *Ball-Matic Needed in Every Vehicle*

The ALJ correctly concluded from the evidence presented at [14] trial that most automobiles manufactured after 1974 have carburetors set to perform at such a lean air/fuel mixture that little, if any, fuel economy could be expected by using an air-bleed valve such as the Ball-Matic. (IDF 8–11.) There are, therefore, a significant number of consumers as to whom the claim of increased fuel economy is untrue. Accordingly, we agree with the ALJ that the claim that every car and truck needs the Ball-Matic is an express statement contrary to fact. (IDF 37.)

As with the "new invention" claim, this misrepresentation concerned a material aspect of the product. In the first place the claim was expressly made, and the Commission may infer materiality.[20] In any event, the claim that the Ball-Matic is needed on every car would tend to induce all consumers (including those owning cars for which it has no utility) to buy the device. Those consumers who cannot in fact profit from the Ball-Matic will have relied on the representation to their detriment. Thus, the ALJ was correct in concluding that this claim was deceptive.

c. *Efficiency Claims*

The ALJ found the representation that the Ball-Matic would significantly improve fuel economy when installed in a typical car and used under normal driving conditions to be false. (IDF 38.) We agree. The record discloses that even under conditions most likely to produce benefits from the Ball-Matic, the fuel savings do not approach those claimed by respondents. Respondent's consumer tests and testimonials also fail to support [15] these claims and, as the ALJ found, are not a recognized way of testing fuel economy. (IDF 41.)

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[18] *Albano Enterprises Inc.,* 89 F.T.C. 523 (1977); *American Consumer, Inc.,* 94 F.T.C. 648 (1979); *R.R. International, Inc.,* 94 F.T.C. 1312 (1979); *Admarketing, Inc.,* 94 F.T.C. 664 (1979); *C.I. Energy Development, Inc.,* 94 F.T.C. 1337 (1979); and *Leroy Gordon Cooper, Jr.,* 94 F.T.C. 674 (1979).

[19] *American Home Products Corp., et al,* 98 F.T.C. 136, at 386 (1981); *Central Hudson Gas and Electric Co. v. PSC,* 447 U.S. 557, 567 (1980). *See,* DS 16.

[20] *Id., see* DS 16.

Claims about enhanced fuel efficiency resulting from use of the Ball-Matic are clearly material to consumers.[21] While consumers will not necessarily expect to achieve the specific fuel economy level represented in a particular advertisement, the performance claimed in the ads should be representative of consumers' expected savings from the Ball-Matic. It was not, and the advertisements were therefore deceptive.

B. *Representation that Competent Scientific Tests Prove the Fuel Economy Claims Made for the Ball-Matic*

1. Was the Claim Made?

Most of respondents' advertisements refer to a "controlled, supervised test." (CX 1–8, 10–15.) The text of some ads details the procedure used in the test, *i.e.*, use of cars equipped with the Ball-Matic driven by non-professional drivers with mileage and fuel consumption monitored by "testers." (IDF 21.) We find that descriptions of these types of consumer "tests" in advertisements cannot, alone, reasonably be interpreted as representing that the device was tested scientifically.

However, other advertisements simply state that the Ball-Matic was "tested and proven [to yield] up to [a] 20 percent increase in fuel economy." (CX 16, 17.) Still other advertisements cite "field tests for over seven years and lab tests at an Accredited Eastern University." (CX 9.) Additional tests results are suggested through respondents' invitation that [16] consumers send for test reports if in doubt about the Ball-Matic's performance. (CX 1, 3–5, 7, 8, 10, 11, 13–17.) These advertisements can be reasonably understood to imply that competent scientific tests support the performance claims made for the Ball-Matic.

2. Was the Claim Deceptive?

Respondents introduced a number of test results with varying evaluations of the Ball-Matic. These include a test conducted by the Vernon, California Emission Test Laboratory, an engine dynamometer test by a University of Bridgeport professor, and a series of tests by Scott Environmental Technology, Industries (RX 43A, 44; RX 217D; RX 221C, E, I; RX 225M.) However, the ALJ found the tests did not prove the fuel economy claims made for the Ball-Matic. (IDF 43. *See also* IDF 40, 41.) We agree.

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[21] *See* DS 17.

First, although the tests did indicate some improvement in fuel economy arguably attributable to the Ball-Matic, none revealed improvement even close to that claimed by respondents. While respondents claim up to 20 percent savings in fuel economy, the highest savings any of the "scientific" tests established was 11 percent. (IDF 40.) Thus, even assuming that respondents' tests were competent, the claim that they support the representation made for the Ball-Matic's performance is false.

Moreover, the evidence presented by complaint counsel casts serious doubt on the validity of the results obtained in respondent's tests. Particularly telling, none of the results showed that gasoline savings of even 11 percent could be duplicated. (IDF 40.) Indeed, tests conducted by complaint **[17]** counsel's experts—under laboratory conditions most conducive to improving gasoline mileage by using the Ball-Matic —showed results substantially lower than those claimed by respondents. The highest fuel savings complaint counsel's experts were able to achieve were approximately 5 percent. (*Id.*, IDF 33–35.)

Finally, complaint counsel's expert witness testified that, given the basic theory of engineering and combustion, a device such as the Ball-Matic could never result in any significant improvement in fuel economy. In fact, he testified that a *loss* in fuel economy was likely on 1974 or later model vehicles, which are designed to operate near peak engine efficiency. (Tr. 1090–1 (Korth).) The ALJ further noted a November 1978 article in *Consumer Reports* magazine disclosing that there is no statistically significant effect on gasoline mileage from the use of air-bleed devices such as the Ball-Matic. (CX 49A; *see* CX 50; Tr. 708–09 (Barnett).) The ALJ also noted an EPA test on the Ball-Matic Valve which gave similar results. (CX 57A–I; Tr. 249 (Smith); Tr. 919, 981 (Koven).)

With respect to materiality, the performance capability of the Ball-Matic is difficult for consumers to evaluate for themselves. Accordingly, consumers will tend to rely more heavily on the scientific support claims made by respondents. Clearly these false claims injured consumers by misleading them on a material point. We thus agree with the ALJ's conclusion that respondents' claim of scientific support is false and deceptive. **[18]**

C. *Representations Based on Consumer Endorsements.*

1. Were the Claims Made?

The complaint charges that respondents used consumer testimonials to make claims of "significant" fuel economy for the Ball-Matic, that these endorsements appeared to be by persons who have used the Ball-Matic in the recent past or are currently using the Ball-Matic, that the experiences presented in the endorsements were typical of all consumers who have used the Ball-Matic, and that the consumer endorsements were presented as freely given by individuals who were unrelated to the marketers of the Ball-Matic.

There is no doubt that respondents made substantial use of testimonials to make performance claims for the Ball-Matic. Numerous advertisements contained a black bordered box with statements by users about their fuel saving experiences, inviting the consumer to "read the results for yourself." (CX 1–8, 9, 10–17.) The improvement in fuel economy reported in the testimonials ranged from two to six miles per gallon. (IDF 23.)

The clear impression created was that the quotes came from actual, current users of the Ball-Matic. (IDF 25, 26 CX 1–8, 10–17.) For example, several advertisements quote phrases such as "Now I get four miles more per gallon," and, "Now that I have installed your unit . . . ." (CX 1–8, 10–17.) Further, the ALJ found that the wording conveyed a sense that the testimonials were given voluntarily: "It gives me great pleasure to express to you my satisfaction," and "Just a short note to inform you of the performance of your Ball-Matic." (IDF 25; CXs 1–8, 10–17.) **[19]**

The advertisements also gave the impression that the testimonials were fairly representative of Ball-Matic users. The consumers quoted appeared to represent a variety of locations nationwide, a wide range of cars, and various occupations (*e.g.*, sheriff, service station owner, accountant, minister). Almost all the ads state "over 100,000 in use". (CX 1–15.)

The ALJ concluded, and we agree, that consumers could reasonably interpret these advertisements as claiming that the Ball-Matic would produce significant fuel economy improvement, that the testimonials were unrestrained and unbiased, that the endorsements were from recent or actual users of the Ball-Matic, and that the experiences were typical of all users.

2. Were the Claims Deceptive?

a. *Performance Claims in Testimonials*

By printing the testimonials, respondents implicity made performance claims similar to those express claims found to be false and deceptive at pages 11–15, *supra*. Thus, irrespective of the veracity of the individual consumer testimonials, respondents' use of the testimonials to make underlying claims that were false and deceptive was, itself, deceptive. Accordingly, we agree with the ALJ that use of these endorsements constituted a law violation. (IDF 42.) **[20]**

b. *Unrevealed Relationship of Endorsers to Seller*

The ALJ found that a good number of the testimonials used in the Ball-Matic advertisements were by business associates of the marketers of the product. Nevertheless, he concluded that the failure to disclose these relationships did not constitute either an unfair or a deceptive practice. Complaint counsel appeal from this holding, and we hold for complaint counsel on this issue.[22]

In its "Guides Concerning the Use of Endorsements and Testimonials in Advertising," the Commission's policy is clear that whenever "there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement" it should be disclosed.[23] In a case such as this, where it is difficult for a consumer to evaluate the effectiveness of the product on his or her own, the consumer is likely to rely more heavily on endorsements by other users, particularly if the consumer believes such endorsements are independent and unbiased. Failure to disclose the relationship, and therefore the bias, will materially affect the weight given to the endorsement. Thus, having determined that the implied claim of impartiality is false and that the failure to disclose the relationship is a material fact to consumers, we conclude that respondents are guilty of making a deceptive claim. [21]

c. *Claim That Endorsers were Current Users*

The ALJ found that most of the testimonials were written in 1973 or 1974. (IDF 46.) Testimony on the record from four endorsers of the Ball-Matic, plus one stipulation, indicated that the experiences of the endorsers of the product did not extend beyond 1976 or 1977. (IDF 45.) Based upon this evidence, the ALJ found that respondents' implied representation in 1979 that the statements were from persons who were current or recent users was false. (IDF 46.) We agree.

As we found in subsection b, *supra,* consumers are likely to rely heavily on the endorsements for the Ball-Matic. Misrepresenting the dates of the experiences presented will materially affect the weight given the endorsement. The claim that the testimonials were recent experiences was both false and material to consumers. We therefore find the claim deceptive.

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[22] Specifically, we accept complaint counsels' proposed finding Nos. 48 and 53, contained in CAP 17.

[23] 16 C.F.R. 225.5 (1982).

d. *Claim That Endorsements Were Typical Experiences*

Complaint counsel did not directly challenge the accuracy of the endorsements, and the ALJ found no dispute that the consumer statements used in respondents' ads were genuine and reflected the perceived experiences of those consumers. (IDF 45.) The ALJ nevertheless found that respondents' claim that these experiences were typical of all users of the Ball-Matic was false, relying primarily on testimony that consumers cannot accurately measure fuel economy themselves. (IDF 42.) We agree the claim was false, but for a slightly different reason.

We have already found that no competent scientific test supports respondents' performance claims. Based upon the [22] evidence in this record, the typical expected fuel economy improvement appears to be at most half that claimed in the endorsements. Therefore, even if the individual experiences were accurate, they cannot be typical experiences and are at best statistical outliers. For the same reasons as in subsection b, *supra*, we find respondents' claim to be false and material to consumers. It was thus deceptive.

D. *Complaint Allegation that Respondents Lacked a Reasonable Basis for their Performance Claims*

In addition to the charges discussed above, the complaint alleges that respondents lacked a reasonable basis for the performance claims they made for the Ball-Matic. A reasonable basis allegation commonly arises in two situations. First, a seller may expressly advertise that his claims are supported by tests. Rather than attacking the veracity of the representation, the Commission may challenge the claim as unsubstantiated and, therefore, deceptive.[24] Second, the Commission may determine that a performance claim made for a product contains an implied representation of substantiation. Again, the Commission might challenge the existence of the substantiation rather than the validity of the performance claim.[25] This latter approach is particularly useful where the validity of the claim is uncertain, but the lack of substantiation is clear. [23]

Here, we already have determined that the underlying performance claims were false. Moreover, our previous discussion regarding the validity of respondents' test claims makes manifest the inadequacy of their substantiation efforts.[26] Accordingly, we need go no further to conclude that respondents did not have a reasonable basis for their claims, and any representation either implied or express, that they did, was false and deceptive.

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[24] *Litton Industries, Inc.*, 97 F.T.C. 1 (1981), *modified*, 676 F.2d 364 (9th Cir. 1982).

[25] *Fedders Corp.*, 85 F.T.C. 38 (1975), *aff'd* 529 F.2d 1398 (2nd Cir.) *cert. denied*, 429 U.S. 818 (1976).

[26] *See* p. 14-17 *supra*.

IV. ORDER

We adopt the Order as issued by the ALJ with the following exception. In Part III of the Order a new subsection is added to read as follows:

b. failing to disclose a material connection, where one exists, between an endorser of any product or service and any of the respondents. A "material connection" shall mean, for purpose of this order, any relationship between an endorser of any product or service and any individual or other entity marketing such product or service which relationship might materially affect the weight or credibility of the endorsement and which relationship would not reasonably be expected by consumers.

Existing subsections in Part III are renumbered accordingly.

APPENDIX

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 14, 1983

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to the Committee's inquiry regarding the Commission's enforcement policy against deceptive acts or practices.[1] We also hope this letter will provide guidance to the public.

Section 5 of the FTC Act declares unfair or deceptive acts or practices unlawful. Section 12 specifically prohibits false ads likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 defines a false ad for purposes of Section 12 as one which is "misleading in a material respect."[2] Numerous Commission and judicial decisions have defined and elaborated on the phrase "deceptive acts or practices" under both Sections 5 and 12. Nowhere, however, is there a single definitive statement of the Commission's view of its authority. The Commission believes that such a statement would be useful to the public, as well as the Committee in its continuing review of our jurisdiction. [2]

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[1] S. Rep. No. 97-451, 97th Cong., 2d Sess. 16; H.R. Rep. No. 98-156, Part I, 98th Cong., 1st Sess. 6 (1983). The Commission's enforcement policy against unfair acts or practices is set forth in a letter to Senators Ford and Danforth, dated December 17, 1980.

[2] In determining whether an ad is misleading, Section 15 requires that the Commission take into account "representations made or suggested" as well as "the extent to which the advertisement fails to reveal facts material in light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." 15 U.S.C. 55. If an act or practice violates Section 12, it also violates Section 5. *Simeon Management Corp.*, 87 F.T.C. 1184, 1219 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978); *Porter & Dietsch*, 90 F.T.C. 770, 873–74 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980

We have therefore reviewed the decided cases to synthesize the most important principles of general applicability. We have attempted to provide a concrete indication of the manner in which the Commission will enforce its deception mandate. In so doing, we intend to address the concerns that have been raised about the meaning of deception, and thereby attempt to provide a greater sense of certainty as to how the concept will be applied.[3]

I. SUMMARY

Certain elements undergird all deception cases. *First*, there must be a representation, omission or practice that is likely to mislead the consumer.[4] Practices that have been found [3] misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.[5]

Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.

Third, the representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary. [4]

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[3] Chairman Miller has proposed that Section 5 be amended to define deceptive acts. Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation, United States Senate, 97th Cong., 2d Sess. *FTC's Authority Over Deceptive Advertising*, July 22, 1982, Serial No. 97-134, p. 9. Three Commissioners believe a legislative definition is unnecessary. *Id.* at 45 (Commissioner Clanton), at 51 (Commissioner Bailey) and at 76 (Commissioner Pertschuk). Commissioner Douglas supports a statutory definition of deception. Prepared statement by Commissioner George W. Douglas, Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science and Transportation, United States Senate, 98th Cong. 1st Sess. (March 16, 1983) p. 2.

[4] A misrepresentation is an express or implied statement contrary to fact. A misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed. Not all omissions are deceptive, even if providing the information would benefit consumers. As the Commission noted in rejecting a proposed requirement for nutrition disclosures, "In the final analysis, the question whether an advertisement requires affirmative disclosure would depend on the nature and extent of the nutritional claim made in the advertisement." *ITT Continental Baking Co. Inc.*, 83 F.T.C. 865, 965 (1976). In determining whether an omission is deceptive, the Commission will examine the overall impression created by a practice, claim, or representation. For example, the practice of offering a product for sale creates an implied representation that it is fit for the purposes for which it is sold. Failure to disclose that the product is not fit constitutes a deceptive omission. [*See* discussion below at 5-6] Omissions may also be deceptive where the representations made are not literally misleading, if those representations create a reasonable expectation or belief among consumers which is misleading, absent the omitted disclosure.

Non-deceptive omissions may still violate Section 5 if they are unfair. For instance, the R-Value Rule, 16 C.F.R. 460.5 (1983), establishes a specific method for testing insulation ability, and requires disclosure of the figure in advertising. The Statement of Basis and Purpose, 44 FR 50,242 (1979), refers to a deception theory to support disclosure requirements when certain misleading claims are made, but the rule's general disclosure requirement is premised on an unfairness theory. Consumers could not reasonably avoid injury in selecting insulation because no standard method of measurement existed.

[5] Advertising that lacks a reasonable basis is also deceptive. *Firestone*, 81 F.T.C. 398, 451-52 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). *National Dynamics*, 82 F.T.C. 488, 549-50 (1973); *aff'd and remanded on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued*, 85 F.T.C. 391 (1976). *National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 191 (1976), *aff'd*, 570 F.2d 157 (7th Cir.), *cert. denied*, 439 U.S. 821, *reissued*, 92 F.T.C. 848 (1978). The deception theory is based on the fact that most ads making objective claims imply, and many expressly state, that an advertiser has certain specific grounds for the claims. If the advertiser does not, the consumer is acting under a false impression. The consumer might have perceived the advertising differently had he or she known the advertiser had no basis for the claim. This letter does not address the nuances of the reasonable basis doctrine, which the Commission is currently reviewing. 48 FR 10,471 (March 11, 1983).

Thus, the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. We discuss each of these elements below.

II. THERE MUST BE A REPRESENTATION, OMISSION, OR PRACTICE THAT IS LIKELY TO MISLEAD THE CONSUMER.

Most deception involves written or oral misrepresentations, or omissions of material information. Deception may also occur in other forms of conduct associated with a sales transaction. The entire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception.[6]

Of course, the Commission must find that a representation, omission, or practice occurred. In cases of express claims, the representation itself establishes the meaning. In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction.[7] In other [5] situations, the Commission will require extrinsic evidence that reasonable consumers reach the implied claims.[8] In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.

Some cases involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.[9] Information may be omitted from written[10] or oral[11] representations or from the commercial transaction.[12] **[6]**

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[6] In *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), the court noted "the likelihood or propensity of deception is the criterion by which advertising is measured."

[7] On evaluation of the entire document:

> The Commission finds that many of the challenged Anacin advertisements, when viewed in their entirety, did convey the message that the superiority of this product has been proven [footnote omitted]. It is immaterial that the word "established", which was used in the complaint, generally did not appear in the ads; the important consideration is the net impression conveyed to the public. *American Home Products*, 98 F.T.C. 136, 374 (1981), *aff'd*, 695 F.2d (3d Cir. 1982).

On the juxtaposition of phrases:

> On this label, the statement "Kills Germs By Millions On Contact" immediately precedes the assertion "For General Oral Hygiene Bad Breath, Colds and Resultant Sore Throats" [footnote omitted]. By placing these two statements in close proximity, respondent has conveyed the message that since Listerine can kill millions of germs, it can *cure*, prevent and ameliorate colds and sore throats [footnote omitted]. *Warner Lambert*, 86 F.T.C. 1398, 1489–90 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (emphasis in original).

On the nature of the claim, *Firestone* is relevant. There the Commission noted that the alleged misrepresentation concerned the safety of respondent's product, "an issue of great significance to consumers. On this issue, the Commission has required scrupulous accuracy in advertising claims, for obvious reasons." 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

In each of these cases, other factors, including in some instances surveys, were in evidence on the meaning of the ad.

[8] The evidence can consist of expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.

[9] As the Commission noted in the Cigarette rule, "The nature, appearance, or intended use of a product may create an impression on the mind of the consumer . . . and if the impression is false, and if the seller does not take adequate steps to correct it, he is responsible for an unlawful deception." Cigarette Rule Statement of Basis and Purpose, 29 FR 8324, 8352 (July 2, 1964).

[10] *Porter & Dietsch*, 90 F.T.C. 770, 873–74 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Simeon Management Corp.*, 87 F.T.C. 1184, 1230 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978).

[11] *See, e.g., Grolier*, 91 F.T.C. 315, 480 (1978), *remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds*, 98 FTC 882 (1981), *reissued*, 99 F.T.C. 379 (1982).

In some circumstances, the Commission can presume that consumers are likely to reach false beliefs about the product or service because of an omission. At other times, however, the Commission may require evidence on consumers' expectations.[13]

Marketing and point-of-sales practices that are likely to mislead consumers are also deceptive. For instance, in bait and switch cases, a violation occurs when the offer to sell the product is not a bona fide offer.[14] The Commission has also found deception where a sales representative misrepresented the purpose of the initial contact with customers.[15] When a product is sold, there is an implied representation that the product is fit for the purposes for which it is sold. When it is not, deception occurs.[16] There may be a concern about the way a product or service is marketed, such as where inaccurate or **[7]** incomplete information is provided.[17] A failure to perform services promised under a warranty or by contract can also be deceptive.[18]

III. THE ACT OR PRACTICE MUST BE CONSIDERED FROM THE PERSPECTIVE OF THE REASONABLE CONSUMER

The Commission believes that to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances.[19] The test is whether the consumer's interpretation or reaction is reasonable.[20] When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond. [8]

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[12] In *Peacock Buick*, 86 F.T.C. 1532 (1975), *aff'd*. 553 F.2d 97 (4th Cir. 1977), the Commission held that

> absent a clear and early disclosure of the prior use of a late model car, deception can result from the setting in which a sale is made and the expectations of the buyer . . . *Id.* at 1555.
>
> [E]ven in the absence of affirmative misrepresentations, it is misleading for the seller of late model used cars to fail to reveal the particularized uses to which they have been put . . . When a later model used car is sold at close to list price . . . the assumption likely to be made by some purchasers is that, absent disclosure to the contrary, such car has not previously been used in a way that might substantially impair its value. In such circumstances. failure to disclose a disfavored prior use may tend to mislead. *Id.* at 1557–58.

[13] In *Leonard Porter*, the Commission dismissed a complaint alleging that respondents' sale of unmarked products in Alaska led consumers to believe erroneously that they were handmade in Alaska by natives. Complaint counsel had failed to show that consumers of Alaskan craft assumed respondents' products were handmade by Alaskans in Alaska. The Commission was unwilling, absent evidence, to infer from a viewing of the items that the products would tend to mislead consumers.

> By requiring such evidence, we do not imply that elaborate proof of consumer beliefs or behavior is necessary, even in a case such as this, to establish the requisite capacity to deceive. However, where visual inspection is inadequate, some extrinsic testimonial evidence must be added. 88 F.T.C. 546, 626, n.5 (1976).

[14] *Bait and Switch Policy Protocol* December 10, 1975; Guides Against Bait Advertising, 16 C.F.R. 238.0 (1967). 32 FR 15,540.

[15] *Encyclopedia Britannica*, 87 F.T.C. 421, 497 (1976), *aff'd*. 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *modified*, 100 F.T.C. 500 (1982).

[16] *See* the complaints in *BayleySuit*, C–3117 (consent agreement) (September 30, 1983) [102 F.T.C. 1285]; *Figgie International, Inc.*, D. 9166 (May 17, 1983).

[17] The Commission's complaints in *Chrysler Corporation*, 99 F.T.C. 347 (1982), and *Volkswagen of America*, 99 F.T.C. 446 (1982), alleged the failure to disclose accurate use and care instructions for replacing oil filters was deceptive. The complaint in *Ford Motor Co.*, D. 9154, 96 F.T.C. 362 (1980), charged Ford with failing to disclose a "piston scuffing" defect to purchasers and owners which was allegedly widespread and costly to repair. *See also General Motors*, D. 9145 (provisionally accepted consent agreement, April 26, 1983). [102 F.T.C. 1741]

[18] *See Jay Norris Corp.*, 91 F.T.C. 751 (1978), *aff'd with modified language in order*, 598 F.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979) (failure to consistently meet guarantee claims of "immediate and prompt" delivery as well as money back guarantees); *Southern States Distributing Co.*, 83 F.T.C. 1126 (1973) (failure to honor oral and written product maintenance guarantees, as represented); *Skylark Originals, Inc.*, 80 F.T.C. 337 (1972), *aff'd*, 475 F.2d 1396 (3d Cir. 1973) (failure to promptly honor moneyback guarantee as represented in advertisements and catalogs); *Capitol Manufacturing Corp.*, 73 F.T.C. 872 (1968) (failure to fully, satisfactorily and promptly meet all obligations and requirements under terms of service guarantee certificate).

[19] The evidence necessary to determine how reasonable consumers understand a representation is discussed in Section II of this letter.

[20] An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. *See Heinz W. Kirchner*, 63 F.T.C. 1282 (1963).

A company is not liable for every interpretation or action by a consumer. In an advertising context, this principle has been well-stated:

> An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not. A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed. *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963).

To be considered reasonable, the interpretation or reaction does not have to be the only one.[21] When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.[22] An interpretation will be presumed reasonable if it is the one the respondent intended to convey.

The Commission has used this standard in its past decisions. ". . . The test applied by the Commission is whether the interpretation is reasonable in light of the claim."[23] In the Listerine case, the Commission evaluated the claim from the perspective of the "average listener."[24] In a case involving the sale of encyclopedias, the Commission observed "[i]n determining the meaning of an advertisement, a piece of promotional material [9] or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace."[25] The decisions in *American Home Products, Bristol Myers,* and *Sterling Drug* are replete with references to reasonable consumer interpretations.[26] In a land sales case, the Commission evaluated the oral statements and written representations "in light of the sophistication and understanding of the persons to whom they were directed."[27] Omission cases are no different: the Commission examines the failure to disclose in light of expectations and understandings of the typical buyer[28] regarding the claims made.

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[21] A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate. *Sears, Roebuck & Co.*, 95 F.T.C. 406, 511 (1980), *aff'd*, 676 F.2d 385, (9th Cir. 1982); *Chrysler*, 87 F.T.C. 749 (1976), *aff'd*, 561 F.2d 357 (D.C. Cir.), *reissued* 90 F.T.C. 606 (1977); *Rhodes Pharmacal Co.*, 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955).

[22] *National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979).

[23] *National Dynamics*, 82 F.T.C. 488, 524, 548 (1973), *aff'd*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued* 85 F.T.C. 391 (1976).

[24] *Warner-Lambert*, 86 F.T.C. 1398, 1415 n.4 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

[25] *Grolier*, 91 F.T.C. 315, 430 (1978), *remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds*, 98 F.T.C. 882 (1981), *reissued*, 99 F.T.C. 379 (1982).

[26] *American Home Products*, 98 F.T.C. 136 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982). ". . . consumers may be led to expect, quite reasonably . . ." (at 386); ". . . consumers may reasonably believe . . ." (*Id.* n.52); ". . . would reasonably have been understood by consumers . . ." (at 371); "The record shows that consumers could reasonably have understood this language . . ." (at 372). *See also*, pp. 373, 374, 375. *Bristol-Myers*, D. 8917 (July 5, 1983), appeal docketed, No. 83–4167 (2nd Cir. Sept. 12, 1983). ". . . ads must be judged by the impression they make on reasonable members of the public . . ." (Slip Op. at 4); ". . . consumers could reasonably have understood . . ." (Slip Op. at 7); ". . . consumers could reasonably infer . . ." (Slip Op. at 11) [102 F.T.C. 21 (1983)]. *Sterling Drug, Inc.*, D. 8919 (July 5, 1983), appeal docketed, No. 83–7700 (9th Cir. Sept. 14, 1983). ". . . consumers could reasonably assume . . ." (Slip Op. at 9); ". . . consumers could reasonably interpret the ads . . ." (Slip Op. at 33). [102 F.T.C. 395 (1983)]

When representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group.[29] For instance, if a company markets a cure to the terminally ill, the practice [10] will be evaluated from the perspective of how it affects the ordinary member of that group. Thus, terminally ill consumers might be particularly susceptible to exaggerated cure claims. By the same token, a practice or representation directed to a well-educated group, such as a prescription drug advertisement to doctors, would be judged in light of the knowledge and sophistication of that group.[30]

As it has in the past, the Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in advertising the Commission will examine "the entire mosaic, rather than each title separately."[31] As explained by a court of appeals in a recent case: [11]

> The Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisements as a whole. Without this mode of examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words. *American Home Products*, 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982).[32]

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[27] *Horizon Corp.*, 97 F.T.C. 464, 810 n.13 (1981).

[28] *Simeon Management*, 87 F.T.C. 1184, 1230 (1976).

[29] The listed categories are merely examples. Whether children, terminally ill patients, or any other subgroup of the population will be considered a special audience depends on the specific factual context of the claim or the practice.

The Supreme Court has affirmed this approach. "The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977).

[30] In one case, the Commission's complaint focused on seriously ill persons. The ALJ summarized:

> According to the complaint, the frustrations and hopes of the seriously ill and their families were exploited, and the representations had the tendency and capacity to induce the seriously ill to forego conventional medical treatment worsening their condition and in some cases hastening death, or to cause them to spend large amounts of money and to undergo the inconvenience of traveling for a non-existent "operation." *Travel King*, 86 F.T.C. 715, 719 (1975).

In a case involving a weight loss product, the Commission observed:

> It is obvious that dieting is the conventional method of losing weight. But it is equally obvious that many people who need or want to lose weight regard dieting as bitter medicine. To these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance, if not abstinence, simply does not pass muster. *Porter & Dietsch*, 90 F.T.C. 770, 864–865 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

Children have also been the specific target of ads or practices. In *Ideal Toy*, the Commission adopted the Hearing Examiner's conclusion that:

> False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue. *Ideal Toy*, 64 F.T.C. 297, 310 (1964).

See also, *Avalon Industries Inc.*, 83 F.T.C. 1728, 1750 (1974).

[31] *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963).

[32] Numerous cases exemplify this point. For instance, in *Pfizer*, the Commission ruled that "the net impression of the advertisement, evaluated from the perspective of the audience to whom the advertisement is directed, is controlling." 81 F.T.C. 23, 58 (1972).

In a subsequent case, the Commission explained that "[i]n evaluating advertising representations, we are required to look at the complete advertisement and formulate our opinions on them on the basis of the net general impression conveyed by them and not on isolated excerpts." *Standard Oil of Calif.*, 84 F.T.C. 1401, 1471 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978), *reissued*, 96 F.T.C. 380 (1980).

The Third Circuit stated succinctly the Commission's standard. "The tendency of the advertising to deceive must

(footnote cont'd)

Commission cases reveal specific guidelines. Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline.[33] Written disclosures or fine print may be [12] insufficient to correct a misleading representation.[34] Other practices of the company may direct consumers' attention away from the qualifying disclosures.[35] Oral statements, label disclosures or point-of-sale material will not necessarily correct a deceptive representation or omission.[36] Thus, when the first contact between a seller and a buyer occurs through a [13] deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.[37] *Pro forma* statements or disclaimers may not cure otherwise deceptive messages or practices.[38]

Qualifying disclosures must be legible and understandable. In evaluating such disclo-

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be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context." *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

[33] In *Litton Industries*, the Commission held that fine print disclosures that the surveys included only "Litton authorized" agencies were inadequate to remedy the deceptive characterization of the survey population in the headline. 97 F.T.C. 1, 71, n.6 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982). Compare the Commission's note in the same case that the fine print disclosure "Litton and one other brand" was reasonable to qualify the claim that independent service technicians had been surveyed. "[F]ine print was a reasonable medium for disclosing a qualification of only limited relevance." 97 F.T.C. 1, 70, n.5 (1981).

In another case, the Commission held that the body of the ad corrected the possibly misleading headline because in order to enter the contest, the consumer had to read the text, and the text would eliminate any false impression stemming from the headline. *D.L. Blair*, 82 F.T.C. 234, 255–256 (1973).

In one case, respondent's expert witness testified that the headline (and accompanying picture) of an ad would be the focal point of the first glance. He also told the administrative law judge that a consumer would spend "[t]ypically a few seconds at most" on the ads at issue. *Crown Central*, 84 F.T.C. 1493, 1543 nn. 14–15 (1974).

[34] In *Giant Food*, the Commission agreed with the examiner that the fine-print disclaimer was inadequate to correct a deceptive impression. The Commission quoted from the examiner's finding that "very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer." 61 F.T.C. 326, 348 (1962).

Cf. Beneficial Corp. v. FTC, 542 F.2d 611, 618 (3d Cir. 1976), where the court reversed the Commission's opinion that no qualifying language could eliminate the deception stemming from use of the slogan "Instant Tax Refund."

[35] "Respondents argue that the contracts which consumers signed indicated that credit life insurance was not required for financing, and that this disclosure obviated the possibility of deception. We disagree. It is clear from consumer testimony that oral deception was employed in some instances to cause consumers to ignore the warning in their sales agreement . . ." *Peacock Buick*, 86 F.T.C. 1532, 1558–59 (1974).

[36] *Exposition Press*, 295 F.2d 869, 873 (2d Cir. 1961); *Gimbel Bros.*, 61 F.T.C. 1051, 1066 (1962); *Carter Products*, 186 F.2d 821, 824 (1951).

By the same token, money-back guarantees do not eliminate deception. In *Sears*, the Commission observed:

> A money-back guarantee is no defense to a charge of deceptive advertising. . . . A money-back guarantee does not compensate the consumer for the often considerable time and expense incident to returning a major-ticket item and obtaining a replacement.

Sears, Roebuck and Co., 95 F.T.C. 406, 518 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982). However, the existence of a guarantee, if honored, has a bearing on whether the Commission should exercise its discretion to prosecute. *See* Deceptive and Unsubstantiated Claims Policy Protocol, 1975.

[37] *See American Home Products*, 98 F.T.C. 136, 370 (1981), *aff'd*, 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982). Whether a disclosure on the label cures deception in advertising depends on the circumstances:

> . . . it is well settled that dishonest advertising is not cured or excused by honest labeling [footnote omitted]. Whether the ill-effects of deceptive nondisclosure can be cured by a disclosure requirement limited to labeling, or whether a further requirement of disclosure in advertising should be imposed, is essentially a question of remedy. As such it is a matter within the sound discretion of the Commission [footnote omitted]. The question of whether in a particular case to require disclosure in advertising cannot be answered by application of any hard-and-fast principle. The test is simple and pragmatic: Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment? *Statement of Basis and Purpose for the Cigarette Advertising and Labeling Trade Regulation Rule*, 1965, pp. 89–90. 29 FR 8325 (1964).

Misleading "door openers" have also been found deceptive (*Encyclopedia Britannica*, 87 F.T.C. 421 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *as modified*, 100 F.T.C. 500 (1982)), as have offers to sell that are not bona fide offers (*Seekonk Freezer Meats, Inc.*, 82 F.T.C. 1025 (1973)). In each of these instances, the truth is made known prior to purchase.

[38] In the Listerine case, the Commission held that *pro forma* statements of no absolute prevention followed by promises of fewer colds did not cure or correct the false message that Listerine will prevent colds. *Warner Lambert*, 86 F.T.C. 1398, 1414 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

sures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller. Disclosures that conform to the Commission's Statement of Enforcement Policy regarding clear and conspicuous disclosures, which applies to television advertising, are generally adequate, **[14]** CCH *Trade Regulation Reporter*, ¶ 7569.09 (Oct. 21, 1970). Less elaborate disclosures may also suffice.[39]

Certain practices, however, are unlikely to deceive consumers acting reasonably. Thus, the Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion.[40] Claims phrased as opinions are actionable, however, if they are not honestly held, if they misrepresent the qualifications of the holder or the basis of his opinion or if the recipient reasonably interprets them as implied statements of fact.[41]

The Commission generally will not pursue cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously.[42] Some exaggerated claims, however, may be taken seriously by consumers and are actionable. For instance, in rejecting a respondent's argument that use of the words "electronic miracle" to describe a television antenna was puffery, the Commission stated:

> Although not insensitive to respondent's concern that the term miracle is commonly used in situations short of changing **[15]** water into wine, we must conclude that the use of "electronic miracle" in the context of respondent's grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae. *Jay Norris*, 91 F.T.C. 751, 847 n.20 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

Finally, as a matter of policy, when consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased, the Commission will examine the practice closely before issuing a complaint based on deception. There is little incentive for sellers to misrepresent (either by an explicit false statement or a deliberate false implied statement) in these circumstances since they normally would seek to encourage repeat purchases. Where, as here, market incentives place strong constraints on the likelihood of deception, the Commission will examine a practice closely before proceeding.

In sum, the Commission will consider many factors in determining the reaction of the ordinary consumer to a claim or practice. As would any trier of fact, the Commission will evaluate the totality of the ad or the practice and ask questions such as: how clear is the representation? how conspicuous is any qualifying information? how important is the omitted information? do other sources for the omitted information exist?

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[39] *Chicago Metropolitan Pontiac Dealers' Ass'n*, C. 3110 (June 9, 1983). [101 F.T.C. 854 (1983)]

[40] An opinion is a representation that expresses only the belief of the maker, without certainty, as to the existence of a fact, or his judgement as to quality, value, authenticity, or other matters of judgement. American Law Institute, *Restatement on Torts, Second* ¶ 538 A.

[41] *Id.* ¶ 539. At common law, a consumer can generally rely on an expert opinion. *Id.* ¶ 542(a). For this reason, representations of expert opinion will generally be regarded as representations of fact.

[42] "[T]here is a category of advertising themes, in the nature of puffing or other hyperbole, which do not amount to the type of affirmative product claims for which either the Commission or the consumer would expect documentation." *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

> The term "puffing" refers generally to an expression of opinion not made as a representation of fact. A seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign to them benefits they do not possess [cite omitted]. Statements made for the purpose of deceiving prospective purchasers cannot properly be characterized as mere puffing. *Wilmington Chemical*, 69 F.T.C. 828, 865 (1966).

how familiar is the public with the product or service?[43]

IV. THE REPRESENTATION, OMISSION OR PRACTICE MUST BE MATERIAL

The third element of deception is materiality. That is, a representation, omission or practice must be a material one for deception to occur.[44] A "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or **[16]** conduct regarding a product.[45] In other words, it is information that is important to consumers. If inaccurate or omitted information is material, injury is likely.[46]

The Commission considers certain categories of information presumptively material.[47] First, the Commission presumes that express claims are material.[48] As the Supreme Court stated recently, "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."[49] Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect.[50] **[17]** Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.[51]

The Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned. Depending on the facts, information pertaining to the central characteristics of the product or service will be presumed material. Information has been found material where it concerns the purpose,[52] safety,[53] efficacy,[54] or cost[55] of the product or service. [18] Information is also likely to be material if it concerns durability, performance, warranties or quality. Information pertaining to a finding by another agency regarding the product may also be material.[56]

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[43] In *Avalon Industries*, the ALJ observed that the " 'ordinary person with a common degree of familiarity with industrial civilization' would expect a reasonable relationship between the size of package and the size of quantity of the contents. He would have no reason to anticipate slack filling." 83 F.T.C. 1728, 1750 (1974) (I.D.).

[44] "A misleading claim or omission in advertising will violate Section 5 or Section 12, however, only if the omitted information would be a material factor in the consumer's decision to purchase the product." *American Home Products Corp.*, 98 F.T.C. 136, 368 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982). A claim is material if it is likely to affect consumer behavior. "Is it likely to affect the average consumer in deciding whether to purchase the advertised product—is there a material deception, in other words?" Statement of Basis and Purpose, *Cigarette Advertising and Labeling Rule*, 1965, pp. 86–87. 29 FR 8325 (1964).

[45] Material information may affect conduct other than the decision to purchase a product. The Commission's complaint in *Volkswagen of America*, 99 F.T.C. 446 (1982), for example, was based on provision of inaccurate instructions for oil filter installation. In its *Restatement on Torts, Second*, the American Law Institute defines a material misrepresentation or omission as one which the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or her own peculiarities, is likely to consider important. Section 538(2). The Restatement explains that a material fact does not necessarily have to affect the finances of a transaction. "There are many more-or-less sentimental considerations that the ordinary man regards as important." Comment on Clause 2(a)(d).

[46] In evaluating materiality, the Commission takes consumer preferences as given. Thus, if consumers prefer one product to another, the Commission need not determine whether that preference is objectively justified. *See Algoma Lumber*, 291 U.S. 54. 78 (1933). Similarly, objective differences among products are not material if the difference is not likely to affect consumer choices.

[47] The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality.

[48] Because this presumption is absent for some implied claims, the Commission will take special caution to ensure materiality exists in such cases.

[49] *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980).

[50] *Cf. Restatement on Contracts, Second* ¶ 162(1).

[51] In *American Home Products*, the evidence was that the company intended to differentiate its products from aspirin. "The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers." *American Home Products*, 98 F.T.C. 136, 368 (1981), *aff'd*, 695 F.2d 681 (3d. Cir. 1982).

[52] In *Fedders*, the ads represented that only Fedders gave the assurance of cooling on extra hot, humid days. "Such a representation is the raison d'etre for an air conditioning unit—it is an extremely material representation." 85 F.T.C. 38, 61 (1975) (I.D.), *petition dismissed*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976).

[53] "We note at the outset that both alleged misrepresentations go to the issue of the safety of respondent's product, an issue of great significance to consumers." *Firestone*, 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

Where the Commission cannot find materiality based on the above analysis, the Commission may require evidence that the claim or omission is likely to be considered important by consumers. This evidence can be the fact that the product or service with the feature represented costs more than an otherwise comparable product without the feature, a reliable survey of consumers, or credible testimony.[57]

A finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique. Injury to consumers can take many forms.[58] Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept. [19]

V. CONCLUSION

The Commission will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment. The Commission will not generally require extrinsic evidence concerning the representations understood by reasonable consumers or the materiality of a challenged claim, but in some instances extrinsic evidence will be necessary.

The Commission intends to enforce the FTC Act vigorously. We will investigate, and prosecute where appropriate, acts or practices that are deceptive. We hope this letter will help provide you and the public with a greater sense of certainty concerning how the Commission will exercise its jurisdiction over deception. Please do not hesitate to call if we can be of any further assistance.

By direction of the Commission, Commissioners Pertschuk and Bailey dissenting,

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[54] The Commission found that information that a product was effective in only the small minority of cases where tiredness symptoms are due to an iron deficiency, and that it was of no benefit in all other cases, was material. *J.B. Williams Co.*, 68 F.T.C. 481, 546 (1965), *aff'd*, 381 F.2d 884 (6th Cir. 1967).

[55] As the Commission noted in *MacMillan, Inc.*:

> In marketing their courses, respondents failed to adequately disclose the number of lesson assignments to be submitted in a course. These were material facts necessary for the student to calculate his tuition obligation, which was based on the number of lesson assignments he submitted for grading. The nondisclosure of these material facts combined with the confusion arising from LaSalle's inconsistent use of terminology had the capacity to mislead students about the nature and extent of their tuition obligation. *MacMillan, Inc.*, 96 F.T.C. 208, 303–304 (1980).

See also, Peacock Buick, 86 F.T.C. 1532, 1562 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977).

[56] *Simeon Management Corp.*, 87 F.T.C. 1184 (1976), *aff'd*, 579 F.2d 1137, 1168, n.10 (9th Cir. 1978).

[57] In *American Home Products*, the Commission approved the ALJ's finding of materiality from an economic perspective:

> If the record contained evidence of a significant disparity between the prices of Anacin and plain aspirin, it would form a further basis for a finding of materiality. That is, there is a reason to believe consumers are willing to pay a premium for a product believed to contain a special analgesic ingredient, but not for a product whose analgesic is ordinary aspirin. *American Home Products*, 98 F.T.C. 136, 369 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982).

[58] The prohibitions of Section 5 are intended to prevent injury to competitors as well as to consumers. The Commission regards injury to competitors as identical to injury to consumers. Advertising and legitimate marketing techniques are intended to "injure" competitors by directing business to the advertiser. In fact, vigorous competitive advertising can actually benefit consumers by lowering prices, encouraging product innovation, and increasing the specificity and amount of information available to consumers. Deceptive practices injure both competitors and consumers because consumers who preferred the competitor's product are wrongly diverted.

with separate statements attached and with separate response to the Committee's request for a legal analysis to follow.

/s/James C. Miller III
Chairman

cc: Honorable James T. Broyhill
Honorable James J. Florio
Honorable Norman F. Lent

COMMISSIONER PERTSCHUK, CONCURRING IN PART AND DISSENTING IN PART

I concur in the majority's findings that respondents violated Section 5. However, I disagree entirely with the legal analysis in the majority opinion and I dissent from the denial of complaint counsel's appeal on the issue of the order's record retention requirements.

Respondents' misrepresentations in this case were unambiguous and undoubtedly material. To put it simply, respondents grossly exaggerated the sole performance feature of their product, the Ball-Matic Gas Saver Valve. Normally, there would be little more to say. However, this is the first deception case the Commission has decided since the announcement of the dubious Policy Statement on Deception of October 14, 1983. Since the validity of the bare majority vote on the Statement is open to question, apparently the new majority feels compelled to establish the Statement's legitimacy now by jumping this case through the hoops of its analytical framework for deception cases, regardless of how unhelpful that exercise may be.

Under the guise of making the law more "clear and understandable," the majority has actually raised the evidentiary threshold for deception cases. In this unusually simple case, the majority's approach does not affect the outcome. One has little difficulty in concluding that consumers reasonably relied on respondents' claims and suffered significant monetary loss as [2] a direct result. However, in other cases the harm from the majority's legal analysis will be palpable and painful.

The majority opinion acknowledges that the Commission need not find actual deception to conclude that Section 5 has been violated. Furthermore, it admits that the courts have traditionally and recently recognized this fact by requiring the Commission to find only that an act or practice has the "tendency or capacity" to mislead consumers. So far, so good. However, three commissioners have found it necessary to improve on language long understood by the courts and previous commissioners, by substituting the word "likely" for "tendency or capacity." "Likely to mislead," they insist, expresses more clearly the notion that actual deception need *not* be found!

The avowed intentions of the majority are admirable, but the *results* of their effort to "fix" an unbroken legal standard are not. Their choice of language is unfortunate, because the word "likely" suggests that some particular degree of likelihood of actual deception must be found. Therefore, it may create the impression, intentionally or not, that the burden of proof is higher than it has always been under the traditional "tendency or capacity" standard.

The new deception analysis has a more serious effect that is clearly not unintentional. That is to withdraw the protection of Section 5 from consumers who do not act "reasonably."

There is, of course, no support in the case law or academic literature for the proposition that deception cannot occur unless reasonable consumers are misled. In a few deceptive advertising [3] cases in which the Commission has determined that Section 5 was violated, it has premised its determination on a finding that consumers could "reasonably" interpret the advertiser's claims in a certain way.[1] Such findings do not mean that consumers must be "reasonable" in order to enjoy the protection of Section 5, just as findings that the "clear import"[2] of an advertisement was false do not mean that ads violate Section 5 only if they "clearly" express a falsity. A finding that consumers could reasonably be misled is a sufficient, but not necessary, way to establish deception.[3] Neither the Commission nor the courts have ever before mandated this method of analysis. [4]

One recent Commission opinion suggests that the Commission must judge ads according to their impression on "reasonable members of the public."[4] However, the correct interpretation of that statement is that the Commission cannot, when an ad is directed to the general public, hold the advertiser to an outlandish interpretation.[5] [5]

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[1] *E.g., American Home Products Corp.*, 98 F.T.C. 136, 367, 371–72, 386 *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982); *Bristol-Myers Co.*, 102 F.T.C. 21, slip op. at 7, 11 (Docket No. 8917, July 5, 1983), *appeal filed*, No. 83–4167 (2d Cir., Sept. 12, 1983).

[2] *E.g., American Home Products*, 98 F.T.C. at 367. Similarly, a finding that a company intended to create a certain impression among consumers (*Id.* at 368), does not imply that the Commission must find intentional misconduct to rule that Section 5 has been violated.

[3] The *American Home Products* case illustrates several ways in which the Commission can reach the conclusion that an advertiser's claims are deceptive. In finding that the company falsely claimed that Anacin contains a pain reliever other than aspirin, the Commission concluded that this was the "clear import" of some ads. *Id.* at 367. As to other ads, it concluded that consumers would "reasonably have understood" such a claim to have been made. *Id.* at 367, 371–72. A third analysis was applied in finding that claims for tension relief had been made. That conclusion was based in large part on expert testimony and a copy test of one advertisement showing that 22% of viewers identified that claim as having been made. *Id.* at 393–94. (The Commission's analysis of tension relief claims was similar in *Bristol-Myers*, slip op. at 44–45.)

[4] *Bristol-Myers*, slip op. at 4–5 ("[T]he Commission may not inject novel meanings into ads and then strike them down as unsupported; ads must be judged by the impression they make on reasonable members of the public.")

[5] This statement of the law is supported by the cases cited in *Bristol-Myers* as authority for the language quoted in note 4. The first case cited is *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952, 954 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960). There the court upheld the Commission's decision to protect "the average male, of which there are millions, who because of masculine vanity will grasp at any straw [to] save his hair. . . ." The court went on to declare that advertisements should be judged by their effect on "the average member of the public who more likely will be influenced by the impression gleaned from a quick glance at the most legible words." *Id.* The second case cited is *International Parts Corp. v. FTC*, 133 F.2d 883, 886 (7th Cir. 1943), in which the court vacated the Commission's order forbidding the company from claiming that the finish on its mufflers permanently prevented rust or corrosion. The court concluded that the company had not claimed that its finish prevented rust permanently, finding that the common meaning of the word "prevents" carries no connotation of permanency. The law of

(footnote cont'd)

In other opinions relied on by the majority, the Commission has stated that its interpretation of ad claims must be "reasonable."[6] Such cases simply convey the Commission's recognition that the *Commission* must act reasonably (*i.e.*, not in an arbitrary or capricious fashion), in determining, in light of the evidence before it, whether an ad could mislead a substantial number of consumers.[7] In none of those cases did the Commission speak of "reasonable consumers." [6]

In this particular case, there is no real dispute as to the meaning of respondents' representations about their product. Further, it is clear that consumers would be "reasonable" in accepting the scientific-sounding, plausible-seeming explanations of respondents as to how (and how well) the product performed. However, this is an easy case, and the majority opinion offers no guidance as to how more difficult matters will be decided.

How will the Commission judge the conduct of consumers who succumb to sales pitches for worthless or grossly over-valued investments? Do "reasonable consumers" buy diamonds or real estate, sight unseen, from total strangers? Is a consumer "acting reasonably" when he or she falls for a hard-sell telephone solicitation to buy "valuable" oil or gas leases from an unknown corporation? Can a consumer "reasonably" rely on oral promises that are expressly repudiated in a written sales contract?

The sad fact is that a small segment of our society makes its livelihood preying upon consumers who are very trusting and unsophisticated. Others specialize in weakening the defenses of especially vulnerable, but normally cautious, consumers. Through skillful exploitation of such common desires as the wish to get rich quick or to provide some measure of security for one's old age, professional con

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this case is that a company "will be presumed to have used [a] word in its ordinary and commonly accepted understanding, in the absence of any showing to the contrary." The other cited case is *Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964), which provides that the Commission will not interpret an ad as it would be unreasonably misunderstood by only an "insignificant and unrepresentative" segment of consumers.

[6] *Sears, Roebuck and Co.*, 95 F.T.C. 406, 511 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982) (Commission overturned the administrative law judge's interpretation of some ads, noting the rule that ads must be "reasonably subject to some interpretation that is false" in order for deception to be found); *Pfizer, Inc.*, 81 F.T.C. 23, 59 (1972) (Commission affirmed the law judge's dismissal of the complaint because alleged implied representations could not "reasonably be found" in the ads). *See also, National Dynamics Corp.*, 82 F.T.C. 488, 548 (1973), *aff'd as modified*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974) (Commission overturned the administrative law judge's holding that an implied representation that the advertiser had substantiation for its claims could not reasonably be found).

[7] The Commission explained this obligation in *The Kroger Co.*, 98 F.T.C. 639, 728 (1981), *modified*, 100 F.T.C. 573 (1982) (citations omitted):

> It is settled that the Commission has sufficient expertise to determine an advertisement's meanings—express and implied—without necessarily resorting to evidence of consumer perceptions. This is not to say that an advertisement is susceptible to every reading that it may technically support, no matter how tenuous it might be; rather, the interpretation must be reasonable in light of the claims made in the advertisement, taken as a whole. In many cases, the Commission has refused to accept particular interpretations urged by complaint counsel because the advertisements themselves did not imply them and no extrinsic evidence had been offered to prove their apprehension by some reasonably significant number of consumers.

men can prompt conduct that many of their victims will readily admit —in hindsight—is patently unreasonable. [7]

Of course, what strikes me as "unreasonable" consumer behavior may not seem so to other commissioners. The very subjective nature of the "reasonable consumer" standard is cause for concern. How can consumer conduct be measured for reasonableness? I know of no test for it, and I am fearful of the *ad hoc* determinations that will be made in the future.

Consumers are much better protected by the traditional test for deception, which requires only that a substantial number of consumers could be misled.[8] This standard does not put the Commission in the position of passing judgment on the credulity, impetuousness, or inattentiveness of the victims of alleged [8] misconduct. Furthermore, the traditional standard allows the Commission to recognize that sellers frequently design their promotional efforts to appeal to specific groups of consumers, even when their conduct is ostensibly directed to the public at large. In such cases, the Commission need only find that a substantial number of consumers in the target group could be misled,[9] considering the sophistication of the persons in that group,[10] their mental state,[11] and their mental [9] capabilities.[12] Thus, a fraudulent scheme may yield relatively few victims in absolute numbers but nevertheless satisfy the legal standard for deception, because the pool of potential buyers is small. The case law has made it clear that Section 5 protects unthinking and credulous consumers as well as those who act "reasonably" in all their commercial transactions.[13]

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[8] *Statement of Basis and Purpose for the Funeral Industry Practices Rule*, 47 FR 42260, 42274 (1982) ("A statement is deceptive under Section 5 of the FTC Act if it actually misleads consumers, or has the tendency or capacity to deceive a substantial segment of the purchasing public in some material respect."); *The Kroger Co.*, 98 F.T.C. 639, 728 (1981), *modified*, 100 F.T.C. 573 (1982) ("In many cases, the Commission has refused to accept particular interpretations urged by complaint counsel because the advertisements themselves did not imply them and no extrinsic evidence had been offered to prove their apprehension by some reasonably significant number of consumers."); *Raymond Lee Organization, Inc.*, 92 F.T.C. 489, 649 (1978), *aff'd*, 679 F.2d 905 (D.C. Cir. 1980) (Section 5 is violated if "substantial numbers of the public are likely to make purchasing decisions based on false beliefs"); *Bristol-Myers Co.*, 85 F.T.C. 688, 744 (1975) ("we agree that a substantial number of consumers surveyed (probably somewhere between 14 percent and 33 percent) understood Dry Ban to be 'dry' "); *Statement of Basis and Purpose for the Cigarette Rule*, 29 FR 8325, 8350 (1964) ("[T]he test of unlawful deception under Section 5 is whether the advertisement in question is likely to deceive a substantial segment of the purchasing public, or of that part of the purchasing public to whom the representation is directed. . . ."); *see also*, *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *Travel King, Inc.*, 86 F.T.C. 715, 759–60 (1975) (initial decision); *Benrus Watch Co., Inc. v. FTC*, 352 F.2d 313, 319–20 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

[9] *Statement of Basis and Purpose for the Cigarette Rule* (*see* quotation *supra* note 8); *Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964) ("If . . . advertising is aimed at a specially susceptible group of people (*e.g.*, children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed."); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 note 37 (1977) (dictum) ("The determination whether an advertisement [for legal services] is misleading requires consideration of the legal sophistication of its audience.")

[10] *Horizon Corp.*, 97 F.T.C. 464, 810 note 13 (1981); *Raymond Lee Organization, Inc.*, 92 F.T.C. 489, 628 (1978), *aff'd*, 679 F.2d 905 (D.C. Cir. 1980); *Tashof*, 74 F.T.C. 1361, 1401 (1968), *aff'd*, 437 F.2d 707 (D.C. Cir. 1970).

[11] *Travel King, Inc.*, 86 F.T.C. 715, 757, 759–60 (1975) (initial decision); *Porter & Dietsch, Inc.*, 90 F.T.C. 770, 865 (1977), *aff'd as modified*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Stauffer Laboratories, Inc. v. FTC*, 343 F.2d 75, 83 (9th Cir. 1965); *Ward Laboratories Inc. v. FTC*, 276 F.2d 952, 954 (2d Cir.) *cert. denied*, 364 U.S. 827 (1960); *Savitch*, 50 F.T.C. 828, 834 (1954), *aff'd*, 218 F.2d 817 (2d Cir. 1955).

[12] *Cigarette Statement*, *supra* note 8, 29 FR at 8358; *Ideal Toy Co.*, 64 F.T.C. 297, 310 (1964) (initial decision) ("False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue."); *ITT Continental Baking Co.*, 83 F.T.C. 865 (1973), *modified*, 83 F.T.C. 1105 (1973), *aff'd*, 532 F.2d 207 (2d Cir. 1976); *Avalon Indus., Inc.*, 83 F.T.C. 1728, 1750 (1974); *Stupell Originals Inc.*, 67 F.T.C. 173, 186–87 (1965); Notice of Proposed Trade Regulation Rulemaking and Public Hearing on Children's Advertising, 43 FR 17967, 17969 (1978).

The third element of deception is materiality. As the Supreme Court has explained, Section 5 prohibits the misrepresentation of "any fact which would constitute a material **[10]** factor in a purchaser's decision whether to buy."[14] Heretofore, any fact that is important to consumers has been considered material, regardless of whether consumer choices would actually turn on that fact. As the Commission has previously said, "[t]he fact that consumers were not harmed because they would have purchased the product anyway . . . is not relevant."[15] The Commission has not required a showing of reliance or injury to establish deception.[16]

The majority opinion in this case, however, suggests somewhat ambiguously that a misrepresentation is not material unless it is "likely to affect" consumers' conduct and "[c]onsumers thus are likely to suffer injury."[17] Similarly, the October 14, 1983, Policy Statement on Deception states: "a finding of materiality is also a finding that injury is likely to exist. . . . Injury exists if consumers would have chosen differently but for the deception."[18]

Respondents here misrepresented the sole performance feature of their product, and it is reasonable to assume in this case that their misrepresentations caused consumers to buy the product **[11]** and suffer monetary loss. However, this is an unusually simple case. What if this case had concerned misrepresentations about a product with many important performance and design features, such as an automobile? If respondents had, for example, made a false fuel efficiency claim for an automobile, would complaint counsel have been required to show that that particular claim would have "tipped the scales" for consumers in their weighing of the many features of automobiles that are important to them? Such a requirement of proof would be exceedingly difficult, if not impossible, to meet in that and many other cases. Indeed, it could effectively preclude the Commission from challenging misrepresentations about complex products.

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[13] *FTC v. Standard Education Society*, 302 U.S. 112, 116 (1937) ("Laws are made to protect the trusting as well as the suspicious."); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 926 (6th Cir. 1968) ("the Commission is bound to protect the public in general, the unsuspecting as well as the skeptical"); *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942) ("The law is not made for experts but to protect the public—that vast multitude which includes the ignorant, the unthinking, and the credulous. . . ."); *Feil v. FTC*, 285 F.2d 879, 887 (9th Cir. 1960); *Gold Bullion International, Ltd.*, 92 F.T.C. 196, 221 (1978), *modified*, 92 F.T.C. 667 (1978); *Niresk Indus., Inc. v. FTC*, 278 F.2d 337, 342 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960) ("[T]he Commission's determination is not restricted to a consideration of what impression an expert or careful reader would draw from the advertisements."); *Indep. Directory Corp. v. FTC*, 188 F.2d 468, 470 (2d Cir. 1951) ("It was reasonably to be expected that a busy business man might . . . [be misled]. Such a misconception is more probable in the case of the careless business man who is also entitled to protection from deception.")

[14] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965).

[15] *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 451 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

[16] *Id. See also*, *Simeon Management Corp.*, 87 F.T.C. 1184, 1229 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978); *Travel King, Inc.*, 86 F.T.C. 715, 774 (1975).

[17] Slip op. at 9.

[18] Deception Statement at 18.

If the majority commissioners intend to require proof of actual or likely reliance on the misrepresentations of respondents in future cases, they have changed the meaning of materiality and made it more difficult to establish violations of Section 5. In any event, they have certainly not made the standard for deception more clear and understandable.

Finally, although I support the order adopted by the majority, I would not limit the recordkeeping requirements of Part IV to the promotion of fuel saving products. Part III of the order governs the use of endorsements for any product as well as any representations concerning "energy savings or energy consumption characteristics of any product." If this part of the order is justified, and I believe it is, then respondents should be required to maintain records that evidence compliance with it.

COMMISSIONER PATRICIA P. BAILEY CONCURRING IN THE RESULT IN PART AND DISSENTING IN PART

The issues pertaining to liability in this case are not complicated. Indeed, the application of established law to the facts in *Cliffdale* can lead to only one conclusion: these respondents have violated Section 5 of the Federal Trade Commission Act in a number of ways, as set forth in this opinion, in their marketing of the Ball-Matic Gas Saver Valve. Thus, I concur fully in the findings of liability. However, I must disassociate myself from the confusing and wholly unorthodox reformulation of the traditional test for finding deception, which has been announced in this opinion as the relevant legal standard.[1] Additionally, I dissent from the Commission's failure to adopt a more expansive order provision concerning the retention of business records. [2]

Legal Standard for Deception

This is an uncomplicated case involving a number of advertising claims, which are clearly false and deceptive, that could have been addressed with swift and sure justice under existing law. Unfortunately, a majority of the Commission has chosen to use the case as a vehicle to set forth a new legal standard which has little to do with the case and much to do with an ill-advised undertaking to rewrite the law of deception.

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[1] In May 1983, the Committee on Energy and Commerce of the U.S. House of Representatives asked the Federal Trade Commission to prepare and submit "an analysis of the law of its deception jurisdiction as presently applied by the Commission and interpreted in case law." In response to that request, on October 21, 1983, Chairman Miller forwarded the appended "Policy Statement on Deception" to the Honorable John D. Dingell, Chairman of the Committee. I dissented from the issuance of that statement. This case represents the first public pronouncement that the principles set forth in that policy statement are intended to be not just current agency enforcement policy, but also the legal standard for future Commission deception cases.

Applying a shorthand variant of the oft-repeated standard for deception, Administrative Law Judge Miles J. Brown concluded in the Initial Decision that "any representation that has a tendency or capacity to mislead or deceive a prospective purchaser is an unfair or deceptive practice which violates the Federal Trade Commission Act."[2] The Commission's opinion dismisses this articulation as being "circular and therefore inadequate to provide guidance on how a deceptive claim should be analyzed."[3] In its place is substituted a new formulation, promoted as "a clear and understandable standard", which states that the Commission will find deception where "first, there is a representation, omission, or practice that is likely to mislead, second, consumers acting reasonably under the circumstances, and third, the representation, omission or practice is material."[4] [3]

Notwithstanding assertions to the contrary, none of these three elements, as defined in the opinion, (or for that matter in the appended Policy Statement) correctly states the factors expressly relied upon in prior Commission cases and by reviewing courts to determine whether a deceptive representation or practice has occurred. Rather, a complete and accurate statement of the elements of deception has typically and traditionally included the three-part formula that an act or practice have the tendency or capacity to mislead a substantial number of consumers in a material way.[5] While the two statements may at first glance seem semantically similar, the fact is that this reformulation departs from current law in several significant respects, all of which have the potential to heighten the Commission's evidentiary burden considerably and thereby limit the time-honored reach of its deception authority. For this reason, I dissent from the legal standard employed in the opinion and believe it is important to examine each of these new elements separately.

The majority's first criterion for deception is that there be a claim, omission or practice that is "likely to mislead" consumers. It is true that the courts have occasionally used this or similar phrasing, such as "the likelihood or propensity" [4] of deception, interchangeable with tendency or capacity.[6] I certainly do not object to and indeed am sympathetic with such usage where the primary goal appears to be to avoid the repetitious use of standard phraseology in the discussion of well-grounded legal principles. Here, however, the majority makes unmistakable its intent to *exchange* the phrase tendency or capacity for the term likely, with only the brief explanation that it is meant to convey an understanding that "actual" deception need not be shown. As that was never in doubt, it does not explain the use of the term likely generally, and it certainly does not make clear how its use will be more instructive in assessing deception.

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[2] ID 35, citing *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977); *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679–80 (2d Cir. 1944).

[3] Slip op. at 7.

[4] *Id.*

[5] An early version of this standard appeared in a 1919 Commission decision. *See Iron Clad Tire*, 1 F.T.C. 380, 385 (1919). The standard was affirmed by the Seventh Circuit the same year. *See Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919). Application of the tendency or capacity standard has continued regularly up to the present. *See American Home Products Corp. v. FTC*, 695 F.2d 681, 686–87 (3d Cir. 1982).

Unfortunately, neither the opinion nor the appended Policy Statement offers additional explanation for this stated preference, leaving us all to guess as to any real or intended distinction from the "tendency or capacity" analysis. A standard Webster's definition of likely, "having a high probability of occurring or being true", suggests, however, that the purposeful substitution of this term for tendency or capacity may well be intended to raise, or may be construed so as to raise, the burden of proof the Commission must meet in demonstrating that deception has occurred. A careful reading of the opinion and the Policy Statement lends support to this inference; recurring references are made to the need for extrinsic evidence of consumer [5] interpretations in many instances where it is not presently required, suggesting a need for the Commission to establish a higher level of probability that deception may have occurred in any particular instance.

Although the Commission has often admitted and relied in the past upon evidence about the effect of an act or practice on consumers, such a showing has not been required by reviewing courts, which have regularly affirmed that such matters are committed to the discretion of the FTC.[7] Thus, use of the term "likely" here may be fairly perceived to be at least a partial retreat from the Commission's traditional position that it may on the basis of its own expertise determine what representations a seller has made to the public. [6]

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[6] *See, e.g., Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967); *Feil v. FTC*, 285 F.2d 879, 886, 896 (9th Cir. 1960).

[7] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965) ("Nor was it necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead."). *See also American Home Products Corp. v. FTC*, 695 F.2d 681, 687–88 & n.10 (3d Cir. 1982); *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.), *cert. denied sub nom. MacKenzie v. United States*, 423 U.S. 827 (1975) (Commission could have reached conclusions regarding deceptive nature of ads without consumer witnesses "whose testimony merely supported the inferences which can logically be drawn by scrutinizing the advertising alone"); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967) (the Commission need not "take a random sample to determine the meaning and impact of the advertisements"); *Carter Products, Inc. v. FTC*, 323 F.3d 523, 528 (5th Cir. 1963); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962) ("Actual consumer testimony is in fact not needed to support an inference of deceptiveness by the Commission."); *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (7th Cir. 1944) ("The Commission was not required to sample public opinion to determine what the petitioner was representing to the public."); *The Kroger Co.*, 98 F.T.C. 639, 728 (1981). *modified*, 100 F.T.C. 573 (1982); *National Dynamics Corp.*, 82 F.T.C. 488, 548 (1973), *aff'd*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974).

The second requirement is that an act or practice be likely to mislead consumers "acting reasonably under the circumstances." Of the three newly introduced elements, I believe this is on its face the most divorced from prior precedent and also the most likely to produce troubling results.

While the precise wording has varied a bit from decision to decision, the concept underlying the existing analytical construct has remained constant: a claim or practice must deceive a "substantial number" of consumers in order to trigger a finding of deception.[8] Importantly, this standard affords protection to consumers and business merchants alike. Thus, it is well recognized that, if a claim is directed at a particular audience, the test is whether it could deceive a significant portion of that group.[9] At the same time, while it is clear that a practice need not mislead all or even a majority of consumers, the Commission will not base findings of law violations on the [7] idiosyncratic interpretations or the unreasonable misunderstandings of an insignificant and unrepresentative segment of a seller's audience.[10]

The substantial numbers test is not intended to lead to the strict quantification of the number of consumers who have been misled by a claim or practice and has, therefore, never required the introduction of external evidence concerning such numbers. Rather the concept provides the Commission with a flexible sliding scale upon which it can typically infer whether or not a significant number of consumers could be deceived from its own examination of the conduct at hand and surrounding circumstances,[11] often based on general information concerning the size and composition of a specific target audience.[12] Even when extrinsic evidence is available, the Commission does not rely exclusively on such documentation in reaching its decision.[13] [8]

Despite the forty-odd year application by the Commission and the courts of a substantial numbers formula, the opinion injects this alternative precept and unknown quantity, the "reasonable consumer," into the law of deception. Again, there is little helpful explanation as to why.

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[8] This element of the deception test has been variously described as requiring: a "substantial segment," *see Statement of Basis and Purpose for the Funeral Industry Practices Rule*, 47 FR 42,260, 42,274 (1982); *Statement of Basis and Purpose for the Cigarette Rule*, 29 FR 8325, 8350 (1964); a "substantial percentage," *see Benrus Watch Co., Inc. v. FTC*, 352 F.2d 313, 319–20 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); "substantial numbers," *see Raymond Lee Organization, Inc.*, 92 F.T.C. 489, 649 (1978), *aff'd*, 679 F.2d 905 (D.C. Cir. 1980); *Bristol-Myers Co.*, 85 F.T.C. 688, 744 (1975); *Travel King, Inc.*, 86 F.T.C. 715, 759 (1975); or "some reasonably significant number," *see The Kroger Co.*, 98 F.T.C. 639, 728 (1981), *modified*, 100 F.T.C. 573 (1982).

[9] *Cigarette Statement, supra* note 8, 29 FR at 8350. *See Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964). *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 383 n.37 (1977).

[10] *Heinz W. Kirchner*, 63 F.T.C. 1282 (1963), *aff'd*, 377 F.2d 751 (9th Cir. 1964). *See also The Kroger Co.*, 98 F.T.C. 639, 728 (1981), *modified*, 100 F.T.C. 573 (1982).

[11] *See, e.g., The Kroger Co.*, 98 F.T.C. 639, 728 (1981), *modified*, 100 F.T.C. 573 (1982).

[12] *See, e.g., Travel King, Inc.*, 86 F.T.C. 715, 759–60 (1975) ("Many thousands of ill persons from all over the world" constituted "substantial numbers" in finding deception where both physical harm (from the interruption of proper medical care and the rigors of international travel) and substantial loss of time and money resulted from trip to the Philippines for "psychic surgery.")

[13] *See, e.g., American Home Products Corp.*, 98 F.T.C. 136, 393–94 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982); *Bristol-Myers Co.*, 102 F.T.C. 21, slip op. at 44–45 (Docket No. 8917, July 5, 1983), *appeal filed*, No. 83-4167 (2d Cir., Sept. 12, 1983).

While the opinion states that the concept of a "consumer acting reasonably in the circumstances" is not new, and the Policy Statement includes citations to recent Commission cases which employ the term "reasonable", reliance on prior FTC decisions for that proposition is misplaced. For example, in several recent deceptive advertising cases, the Commission has based a finding of liability under Section 5 on its determination that consumers could "reasonably interpret" the advertiser's claims in a particular fashion.[14] While this language describes one approach among many available to the Commission in the exercise of its authority to determine whether or not a representation is deceptive, it by no means established a legal requirement that consumers *act* reasonably or that the Commission must examine consumer behavior in those cases in which it was used, nor was it intended to circumscribe, much less preclude, the continued use of other long-accepted methods for finding [9] deception in Commission cases generally.[15] I believe other citations to recent Commission matters are equally inapposite.[16]

The consequences of this hastily constructed house of cards, devoid as it is of any support in Commission precedent, accompanying explanation, or meaningful application in this particular case, may be far reaching. Practically speaking, one obvious result may be to complicate and delay Commission trial proceedings. If the reasonableness of consumer interpretations becomes a litigable issue—and there is every reason to believe that future respondents' counsel will assure that it will be under the new standard—survey evidence or expert testimony regarding consumer attitudes and actions may be mandated in even the simplest Commission cases.[17] The introduction of such evidence will, in turn, raise difficult questions about related evidentiary issues, such as whether new discovery and cross-[10]examination rights concerning survey methodology and results have been created.[18] It does not take a seer to predict that the real beneficiaries of these procedural complications and the ensuing delay will be FTC respondents and their counsel, and not the Commission or the public.

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[14] *See, e.g., American Home Products Corp.*, 98 F.T.C. 136, 367, 371–72, 386 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982); *Bristol-Myers*, 102 F.T.C. 21, slip op. at 7, 11 (Docket No. 8917, July 5, 1983), *appeal filed*, No. 83-4167 (2d Cir., Sept. 12, 1983).

[15] For a description of several different approaches used by the Commission to determine whether an advertiser's claims have a tendency to deceive, *see American Home Products Corp.*, 98 F.T.C. 136, 367, 371–72, 393–94 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982).

[16] For example, in *National Dynamics Corp.*, 82 F.T.C. 488, 548 (1973), *aff'd as modified*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), the use of the term "reasonable" refers to the requirement that the *Commission* act in a reasonable (as opposed to arbitrary or capricious) way in determining that consumers could be misled by a claim or practice. For a general explanation of this obligation, *see The Kroger Co.*, 98 F.T.C. 639, 728 (1981), *modified*, 100 F.T.C. 573 (1982).

[17] Even in the instant matter, a particularly uncomplicated Commission case, the majority specifically notes that, while it is able to "interpret the claims as a reasonable consumer would have", evidence as to how consumers actually interpreted respondents' ads "would have been helpful." Slip op. at 12.

Another unfortunate but foreseeable consequence of the introduction of a reasonable consumer standard is to cast the courts adrift in their efforts to understand and apply to Commission cases what is clearly a departure from prior law. What, for example, are the elements of a reasonable consumer test? Without more, the courts may logically turn for guidance to certain common law principles, such as the standard of "ordinary prudence or care" attributable to the hypothetical "reasonable man" in tort law.[19] Although principles such as these are useful tools to establish objective standards for judging individual conduct which may result in physical or emotional harm to others, comparable concepts have no place in the examination of *consumer* behavior in the marketplace, as the [11] Commission has made clear in the past.[20] Thus, while the Commission has indicated that it will not subject sellers to every interpretation made by an "insubstantial and unrepresentative segment" of the seller's audience, it has at the same time faithfully adhered to the enduring proposition that consumers are entitled to take commercial representations at face value and need not mistrust them.[21] I believe the imposition of a "reasonable consumer" test as an element of the legal standard for deception may seriously jeopardize this guiding principle of deception law, which has permitted and encouraged the Commission to spread its protective mantle over the uninformed and [12] credulous,[22] those with understandable but often unreasonable hopes,[23] those with limited reasoning abilities, such as children,[24] and even "average" consumers whose guard may be down or who may behave somewhat carelessly in the face of deceptive conduct.[25] [13]

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[18] *See* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 679 (1977).

[19] *See, e.g.*, Restatement (Second) of Torts §§ 281–328D (1965).

[20] *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962) ("[W]e think it plain that a deviation of one digit in the date on a coin is not likely to distinguish it sufficiently from the original to alert an 'unsuspecting person of ordinary observation and care' whom the criminal counterfeit law protects, let alone the 'ignorant, unthinking and credulous' who are not excluded from the protection of civil consumer law.").

The Commission has, however, applied an analogous concept to determine whether a *seller* possessed and relied upon a "reasonable basis" for believing a representation to be true. *See National Dynamics Corp.*, 82 F.T.C. 488, 553, 557 (1973), *aff'd as modified*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974) (finding was based on whether the advertiser "acted upon information which would satisfy a reasonably prudent businessman" that the representation is true and that he thus acted in "good faith"). *See also Pfizer Inc.*, 81 F.T.C. 23, 64 (1972). While the Commission has not applied this standard often, it rightfully reflects, I think, society's general determination that the seller assumes certain risks and responsibilities in making product offerings—burdens which should not be shifted unfairly to consumers.

[21] *See FTC v. Standard Education Society*, 302 U.S. 112, 116 (1937).

[22] *See, e.g.*, *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942) ("The law is not made for experts but to protect the public—that vast multitude which includes the ignorant, the unthinking, and the credulous. . . ."); *Feil v. FTC*, 285 F.2d 879, 887 (9th Cir. 1960); *Gold Bullion International, Ltd.*, 92 F.T.C. 196, 221 (1978), *modified*, 92 F.T.C. 667 (1978).

[23] *See, e.g.*, *Travel King, Inc.*, 86 F.T.C. 715, 757, 759–60 (1975); *Porter & Dietsch, Inc.*, 90 F.T.C. 770, 865 (1977), *aff'd as modified*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Stauffer Laboratories, Inc. v. FTC*, 343 F.2d 75, 83 (9th Cir. 1965); *Ward Laboratories, Inc.*, 276 F.2d 952, 954 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960).

[24] *See, e.g.*, *Cigarette Statement*, *supra* note 8, 29 FR at 8358 (quoting *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 313 (1934)). *See also Ideal Toy Co.*, 64 F.T.C. 297, 310 (1964) (initial decision); *ITT Continental Baking Co.*, 83

(footnote cont'd)

Although the Policy Statement promises to continue the traditional protections afforded such groups, a reasonable consumer standard, like the rejected doctrine of caveat emptor, is analytically unsuited for such purposes. By definition the term reasonable means "possessing sound judgment." Thus, while the Commission may logically continue to consider "reasonable consumer interpretations" in instances where it may be one acceptable approach, such as in cases involving major national advertising campaigns aimed at mass audiences, traditional Commission fraud cases, focusing as they generally do on seller exploitation of *unreasonable* consumer judgments and actions, will never lend themselves in an appropriate way to such an analysis. Unlike the "substantial numbers" test, which by design encompasses both types of cases by focusing on the likely reactions of a seller's intended audience—whatever human frailties the group may exhibit —to a marketing message, the majority's approach will, I believe, require much analytical sleight of hand if the protections long promised and provided by the FTC to vulnerable consumers is to continue.

The third and last element of the new deception triumvirate is a requirement that the representation, practice, or omission [14] be "material". Of the new requirements, this has the potential to be the wolf in sheep's clothing. The Commission has long held that a challenged act or practice must be misleading in a material respect in order to be found deceptive. Additionally, the opinion accurately states that materiality has been generally defined to include any sort of consumer preference which is likely to affect the purchasing decision[26] or post-purchase use of the product.[27] And, perhaps most signifi-

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F.T.C. 865, *modified*, 83 F.T.C. 1105 (1973), *aff'd*, 532 F.2d 207 (2d Cir. 1976); *Avalon Indus., Inc.*, 83 F.T.C. 1728, 1750 (1974); *Stupell Originals, Inc.*, 67 F.T.C. 173, 186–87 (1965); *Notice of Proposed Trade Regulation Rulemaking and Public Hearing on Children's Advertising*, 43 FR 17,967, 17,969 (1978).

[25] *See, e.g., Independent Directory Corp. v. FTC*, 188 F.2d 468, 470 (2d Cir. 1951) ("It was reasonably to be expected that a busy business man might . . . [be misled]. Such a misconception is more probable in the case of the careless business man who is also entitled to protection from deception."); *American Home Products Corp. v. FTC*, 695 F.2d 681, 689 (3d Cir. 1982) ("If accepted, AHP's position [on the meaning of its advertisements] might well preclude the Commission from taking action against advertisements that, when read with scrupulous care by vigilant and literal-minded consumers, could be seen to be making true claims."); *Colgate-Palmolive Co. v. FTC*, 310 F.2d 89, 91 (1st Cir. 1962), *rev'd on other grounds*, 380 U.S. 374, 391–92 (1965) ("It should be obvious by now to anyone that advertisements are not judged by scholarly dissection in a college classroom."); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952, 954 (2d Cir.) *cert. denied*, 364 U.S. 827 (1960) ("[A]dvertisements are not to be judged by their effect upon the scientific or legal mind which will dissect and analyze each phrase but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a quick glance at the most legible words."); *Stupell Originals, Inc.*. 67 F.T.C. 173, 186 (1965) ("[W]hile the risk of injury [from respondent's product] . . . may be obvious to the person who pauses to consider such possibility, we seriously doubt that the ordinary purchaser would dwell on this eventuality.")

[26] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965); *American Home Products Corp.*, 98 F.T.C. 136, 368 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982).

[27] Care Labeling of Textile Wearing Apparel Rule, 16 C.F.R. 423 (1983) (requiring the disclosure of proper instructions for the laundering and cleaning of clothing).

Also, in the last several years the Commission has alleged in numerous settled cases that information pertaining to the use or care of a product is material to consumers. *See, e.g., American Motors Corp.*, 100 F.T.C. 229 (1982)

(footnote cont'd)

cantly, the opinion carefully and correctly disavows any requirement of a specific finding that actual injury has occurred.[28]

Just when all appears to be going well, however, the opinion (and at greater length the Policy Statement) introduces a series of new concepts which appear to qualify standard principles of [15] materiality in a restrictive fashion. At one point the opinion seems to equate materiality with the actual effects of claims or practices on consumer conduct,[29] and the Policy Statement expressly states that "injury and materiality are different names for the same concept" and that deception will be found where an act or practice "misleads . . . to the consumer's detriment."[30] (Detriment is, of course, legally defined as injury.) The Policy Statement also notes that injury exists if consumers would have chosen differently "but for" the misleading act or practice, suggesting that reliance and causation are elements of materiality.[31]

While I don't pretend to understand the full import of these statements, they certainly imply the possible imposition in at least some cases of new evidentiary requirements that are contrary to current law. Because Section 5 protects consumer preferences generally, including subjective preferences, materiality can be found without reference to objective injury or "detriment."[32] Moreover, because purchasers may be influenced by a combination or variety of factors, it may be virtually [16] impossible to establish that a particular misrepresentation caused consumers to choose differently, much less that they were "injured" in some respect by the selection made. Hence, under the law, "(t)he fact that consumers were not harmed because they would have purchased the product anyway . . . is not relevant."[33]

Opinion and Policy Statement conclusions that injury and materiality are synonymous, that causation and reliance must be shown, or even that the likelihood of consumer detriment must be demonstrated in every case do not square with these accepted understandings of materiality. Like the other elements of the new deception standard,

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(safe use of Jeeps in on-pavement driving); *Chrysler Corp.*, 99 F.T.C. 347 (1982) (use and care information pertaining to the replacement of oil filters in vehicles). The Commission has also issued complaints in matters still in litigation alleging the materiality of use and care information. *Volkswagen of America*, Docket No. 9154 (complaint issued Apr. 1, 1981) (use and care of Volkswagen and Audi vehicles); *International Harvester Co.*, Docket No. 9147 (complaint issued Oct. 10, 1980) (use and care of tractors).

[28] *See Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965); *Simeon Management Corp.*, 87 F.T.C. 1184, 1229 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978).

[29] *See* Slip op. at 9.

[30] Deception Policy Statement at 19.

[31] *Id.*

[32] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965); *Simeon Management Corp.*, 87 F.T.C. 1184, 1229 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978) (quoting *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.), *cert. denied sub. nom. Mackenzie v. United States*, 423 U.S. 827 (1975) ("Neither actual damage to the public nor actual deception need be shown.")).

[33] *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 451 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). *See also Travel King, Inc.*, 86 F.T.C. 715, 774 (1975) ("it need not be shown that even one consumer actually relied on a particular false claim.")

the effects of such requirements may well be to raise the burden of proof regarding materiality generally in FTC cases, while at the same time seriously jeopardizing more complicated cases in which specific consumer harm is not easily demonstrated. I am particularly concerned that a restrictive materiality test may serve to undermine the Commission's ad substantiation doctrine. If actual injury or even the likelihood of harm must be shown in all events, the Commission may, in addition to demonstrating a lack of substantiation, be forced to [17] prove falsity in many advertising cases where it is not presently required, in order to establish the necessary link to concrete consumer detriment.

The effort to apply the new deception standard to the instant case is, I believe, a particularly confusing and profitless effort. As I noted at the outset, this case is unusually clearcut, involving as it does a variety of false performance claims, the meaning and import of which can be readily discerned from an examination of respondents' advertisements and the record generally. Nevertheless, the opinion strains valiantly at several junctures to introduce specific findings concerning the "reasonableness" of consumer behavior and the presence of materiality or "detriment" in *Cliffdale*. Again, I have no quarrel with the conclusions reached in this case, but analyzing it by applying these new elements is a wholly unnecessary exercise which demonstrates, I fear, the serious evidentiary difficulties and the exercise of even greater analytical gymnastics that will be necessary in future, more complicated Commission cases.

For the most part, however, the opinion concedes that this case precludes application of this purported new legal standard in any meaningful fashion, and, as a result, the lengthy discussion of it in the opinion and appended Policy Statement is a largely academic exercise. Rather than clarifying the law of deception, the opinion attempts to write new law which is destined to confound its readers. If applied literally, the new three part definition could narrow the Commission's authority to [18] prosecute a range of dishonest or deceptive conduct, while creating complications and uncertainty about the cases we do bring. In the absence of further practical guidance from the Commission and the courts, however, I believe interested parties would be well advised to adhere to tried and true legal strictures governing deception in the conduct of their commercial affairs.

Record Retention Requirements

I also dissent from the failure to require that the record keeping provisions set forth in Part IV of the order be extended to apply to the marketing of all products, to the extent they are covered by the order.

This omission seriously undermines the reach of Part III of the order which applies to non-fuel saving products marketed by Cliffdale.

Significantly, Part III expands order coverage to "all products" marketed by the respondents by requiring that they not misrepresent or misuse testimonials, misrepresent tests or survey results concerning energy savings or consumption, or use energy savings claims without a reasonable basis. In the circumstances of this case, this is a reasonable and justifiable order provision and the opinion does not contest the burden of imposing it on these respondents.

However, the majority has refused to include in the order parallel provisions requiring the retention of records with respect to the product coverage set forth in Part III. Unless records are retained, the Commission will be unable to monitor respondents' compliance with the order in an efficient or [19] effective manner. As discussed by complaint counsel, under these circumstances a more expansive retention requirement is entirely consistent with the record keeping provisions contained in a number of recent Commission orders.[34] It is also consistent with the broad record keeping provisions of consent orders concerning other marketers of gas-saving products.[35]

ORDER

PART I

It is ordered, That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of the automobile retrofit device variously known as the Ball-Matic, the Ball-Matic Valve, the Ball-Matic Gas Saver Valve and the Gas Saver Valve, or any other automobile retrofit device (as "automobile retrofit device" is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011) [2] having substantially similar properties, in or affecting commerce as "commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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[34] *See, e.g., Grolier, Inc.,* 91 F.T.C. 315 (1978), *remanded on other grounds,* 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds,* 99 F.T.C. 379 (1982); *Sears, Roebuck and Co.,* 95 F.T.C. 406 (1980), *aff'd,* 676 F.2d 385 (9th Cir. 1982); *Jay Norris Corp.,* 91 F.T.C. 751 (1978), *aff'd,* 598 F.2d 1244 (2d Cir.), *cert. denied,* 444 U.S. 980 (1979); *Porter & Dietsch, Inc.,* 90 F.T.C. 770 (1977), *aff'd,* 605 F.2d 294 (7th Cir. 1979), *cert. denied,* 445 U.S. 950 (1980).

[35] *See, e.g., American Consumer, Inc.,* 94 F.T.C. 648 (1979); *R.R. International, Inc.,* 94 F.T.C. 312 (1979); *C.I. Energy Development, Inc.* 94 F.T.C. 1337 (1979).

a. representing, directly or by implication, that such device is a unique product or new invention; and

b. representing, directly or by implication, that such device is needed on every vehicle except Volkswagens, diesel vehicles and fuel injection vehicles.

PART II

It is further ordered, That respondents Cliffdale Associates, Inc, a corporation, its successors and assigns, and its officers, and Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile gasoline additive, engine oil additive, or automobile retrofit device (as "automobile retrofit device" is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011), in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless, and only to the extent, respondents possess and rely upon a reasonable basis which substantiates such representation at the time of its initial and each subsequent dissemination. This [3] reasonable basis shall consist of competent and reliable tests, such as:

a. chassis dynamometer tests done according to procedures that simulate typical urban and highway driving patterns, such as the then current urban and highway driving test schedules established by the Environmental Protection Agency; or

b. track or road tests done according to procedures that simulate urban and highway driving patterns, such as the then current procedures established in the Society of Automobile Engineers' J1082b test protocol.

A competent and reliable test means one in which persons qualified to do so conduct the test and evaluate its results in an objective manner using procedures that insure accurate and reliable results.

Respondents shall, when using the results of any tests required by this Part, clearly and conspicuously disclose the limitations upon the applicability of the results to any automobile, truck, recreational vehicle, or other motor vehicle. Where the results of such tests are used in connection with a representation of fuel economy improvement expressed in miles per gallon (or liter), miles per tankful, or percentage, or where the representation of the benefit is expressed as a monetary saving in dollars or percentages, all advertising and other sales promotional materials that contain the representation must also clearly and conspicuously disclose the following disclaimer: "REMINDER: Your actual saving may vary. It depends on the kind of driving you do, how you drive and the condition of your car." [4]

PART III

It is further ordered, That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, and its officers, Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. using, publishing, or referring to any endorsement unless respondents have good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained;

b. failing to disclose a material connection, where one exists, between an endorser of any product or service and any of the respondents. A "material connection" shall mean, for purpose of this order, any relationship between an endorser of any product or service and any individual or other entity marketing such product or service which relationship might materially affect the weight or credibility of the endorsement and which relationship would not reasonably be expected by consumers.

c. representing, directly or by implication, any energy savings or energy consumption characteristics of any product, other than any gasoline additive, engine oil additive, or automobile retrofit device (as "automobile retrofit device" is defined in the Automobile Information and Cost Savings Act, 15 U.S.C. 2011), unless, at the time of making the representation, respondents possess and [5] reasonably rely upon competent and reliable evidence that substantiates such representation;

d. representing, directly or by implication, that any consumer endorsement of a product or service represents the typical or ordinary experience of members of the public who use the product unless this is the case;

e. misrepresenting, in any manner, the purpose, procedure, results, or conclusion of any test or survey pertaining to the energy saving or energy consumption characteristics of any product.

PART IV

It is further ordered, That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, and its officers, and Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any fuel saving product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain accurately the following records which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of and dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; documents relating to the use of or publication of endorsements; records of the number of pieces of direct mail advertising sent in each direct mail advertisement dissemination; [6] documents which substantiate, contradict, or otherwise relate to any claim which is a part of the advertising, sales promotional materials, or post-purchase materials disseminated by respondents directly or through any business entity. Such documentation shall be retained by respondents for a period of three (3) years from the last date any such advertising, sale promotional materials, or post-purchase material is disseminated.

PART V

It is further ordered, That the corporate respondent shall forthwith distribute a copy of this order to all operating divisions of said corporation, and to all present and future personnel, agents, or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order and that the corporate respondent shall secure from each such person a signed statement acknowledging receipt of the order.

PART VI

It is further ordered, That the corporate respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

PART VII

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of [7] their present business or employment and of their affiliation with each new business or employment for a period of ten years from the effective date of this order. Each such notice shall include the respondents' new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

PART VIII

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, and also one (1) year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

It is so ordered.

Commissioners Pertschuk and Bailey concurred in part and dissented in part.

IN THE MATTER OF

GEORGIA-PACIFIC CORPORATION

VACATING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2402. Consent Order, May 16, 1973—Vacating Order, April 3, 1984

On April 3, 1984, the Federal Trade Commission terminated the order issued against Georgia-Pacific Corp. on May 16, 1973 (82 F.T.C. 1428).

ORDER REOPENING AND TERMINATING ORDER ISSUED MAY 16, 1973

On December 8, 1983, respondent Georgia-Pacific Corporation ("Georgia-Pacific") filed a "Request To Reopen And Vacate Consent Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Request asks the Commission to reopen the consent order issued on May 16, 1973 ("the Order") [82 F.T.C. 1428], and vacate it in its entirety. Georgia-Pacific's Request was on the public record for thirty days and no comments were received.

After reviewing respondent's Request, the Commission has concluded that the public interest warrants reopening and terminating the Order. The action we take today is consistent with our recent determinations in *Occidental Petroleum Corp.*, Docket No. 2492, March 9, 1983, [101 F.T.C. 373] and in *The Southland Corp.*, Docket No. 8915, October 25, 1983. [102 F.T.C. 1337]

Accordingly, *it is ordered* that this matter be, and it hereby is, reopened and that the Commission's order issued on May 16, 1973, shall be of no further force and effect as of the effective date of this order.

Commissioner Bailey voted in the negative.

IN THE MATTER OF

GENERAL FOODS CORPORATION

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC.5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT

Docket 9085. Complaint, July 14, 1976—Final Order, April 6, 1984

In this Final Order, the Commission denied complaint counsel's appeal against an ALJ's Initial Decision dated Jan. 25, 1982, sustained the ID for reasons set forth in its accompanying Opinion, and dismissed the Complaint charging a leading processed food manufacturer with violating Section 5 of the Federal Trade Commission Act and Section 2(a) of the Clayton Act, in connection with the marketing of Regular Maxwell House Coffee.

Appearances

For the Commission: *Edward J. Carnot, Michael Goldenberg, Jane Seymour, Wayne Kaplan* and *Richard F. Silvestri.*

For the respondent: *Paul C. Warnke, John F. Kovin, John G. Calender, Robert P. Reznick* and *Don Scott DeAmicis, Clifford & Warnke,* Washington, D.C. and *Robert Y. Fox,* in-house counsel, White Plains, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Foods Corporation is in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues its Complaint charging as follows:

DEFINITIONS

1. For the purpose of this Complaint, the following definitions shall apply:

(a) *Regular coffee* is coffee processed from unroasted coffee beans by means of blending, roasting, and grinding into varying granular sizes and which must be heated and steeped in water before being consumed. It is generally packed and sold in vacuum tin containers and paper bags. It is to be distinguished from soluble (instant) coffee.

(b) *Consumer promotions* are discounts or other offerings to the consumer to encourage him to purchase the brand promoted.

(c) *Trade promotions* are discounts or other financial incentives to the grocer or wholesaler. [2]

RESPONDENT

2. General Foods Corporation (hereinafter "General Foods") is a Delaware corporation with its executive office located at 250 North Street, White Plains, New York.

3. Coffee is one of General Foods' principal product lines. Coffee sales make up approximately 29% of the total revenues of General Foods and regular coffee constitutes a substantial portion of such coffee sales.

4. In fiscal year 1975 General Foods had total sales of approximately $3.7 billion, in fiscal year 1974, $3.0 billion, in fiscal year 1973, $2.6 billion, in fiscal year 1972, $2.4 billion and in fiscal year 1971, $2.3 billion.

5. The Maxwell House Division of General Foods is principally responsible for the manufacture, distribution and sale of coffee. Sales volume for the Maxwell House Division approximated $900 million in fiscal year 1974, $763 million in fiscal year 1973, $703 million in fiscal year 1972 and $662 million in fiscal year 1971.

6. The relevant market is the production, distribution and sale of regular coffee packaged for sale at retail in Maxwell House Division's eastern region. Relevant geographic submarkets include the Cleveland and Pittsburgh market areas of Maxwell House Division's Youngstown, Ohio District, the Wilkes Barre and Philadelphia market areas of Maxwell House Division's Philadelphia, Pennsylvania District and each market area of Maxwell House Division's Syracuse, New York District.

7. Concentration of sales for regular coffee packaged for sale at retail in the United States has increased from approximately 66% for the four largest producers in 1971 to approximately 72% in 1974.

8. General Foods, through its Maxwell House Division, is the largest seller of regular coffee packaged for sale at retail in the United States. It accounted for approximately 31% of such sales in the United States in 1972, 34% in 1973, and 35% in 1974. [3]

9. The Maxwell House Division of General Foods was the dominant seller of regular coffee packaged for sale at retail in the relevant market and each relevant submarket during the years 1971 through 1975, accounting, in each year, for approximately 45% or more of sales of regular coffee packaged for sale at retail in the relevant market and approximately 50% or more of such sales in the relevant submarkets.

OFFENSES ALLEGED

10. General Foods, through its Maxwell House Division, has used and is using its dominant position, size and economic power to frustrate the growth of smaller regular coffee producers and to frustrate entry of other regular coffee producers into the relevant market and submarkets and to prevent, hinder or lessen competition in the production, distribution or sale of regular coffee packaged for sale at retail in the relevant market and submarkets.

More particularly, General Foods, through its Maxwell House Division, since at least October, 1971, has adopted and placed into effect and carried out various policies, acts, practices, or methods of competition to foreclose entry and to lessen, restrain, eliminate or prevent the production, distribution or sale of regular coffee packaged for sale at retail by others engaged in the production, distribution or sale of such product in each market and submarket identified and alleged herein. Among such policies, acts, practices or methods of competition, General Foods, through its Maxwell House Division, has engaged in one or more of the following:

(a) Selling regular coffee packaged for sale at retail below cost or at unreasonably low prices;

(b) Using extensive consumer and trade promotions and advertising to forestall or foreclose market entry or to lessen competition; [4]

(c) Engaging in geographically discriminatory pricing and promotional and advertising practices to forestall or foreclose entry or lessen competition;

(d) Foreclosing and deterring new entry by increasing advertising and promotional expenditures in previously established marketing areas of the new entrant in retaliation for entry into the relevant market and submarkets.

(e) Using a fighting brand of regular coffee to forestall or foreclose entry or lessen competition.

EFFECTS

11. The aforesaid policies, acts, or practices have or may have the following effects in one or more of the relevant market and submarkets alleged herein, among other things:

(a) Monopolizing the production, distribution or sale of regular coffee packaged for sale at retail;

(b) Increasing entry barriers in the production, distribution or sale of regular coffee packaged for sale at retail;

(c) Preserving, maintaining, or furthering highly concentrated market structures;

(d) Hindering, restraining, foreclosing or frustrating competition in the production, distribution or sale of regular coffee packaged for sale at retail;

(e) Depriving consumers of the benefits of free and open competition.

JURISDICTION

12. The policies, acts and practices of General Foods' Maxwell House Division as alleged herein at all times relevant hereto have been in or have affected commerce within the meaning of the Federal Trade Commission Act. [5]

13. In the course and conduct of its business, General Foods' Maxwell House Division is now, and for many years past has been, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed, and is now selling and distributing, regular coffee packaged for sale at retail to purchasers thereof located in States other than the State of origin of shipments and has, either directly or indirectly, caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States, as part of a constant course and flow of trade and commerce in such products between General Foods' Maxwell House Division in the State of origin and purchasers thereof located in other States and the District of Columbia.

General Foods, through its Maxwell House Division, has shipped and sold regular coffee packaged for sale at retail to purchasers with places of business located throughout the several States of the United States and the District of Columbia for resale to customers within the United States.

VIOLATIONS

14. In the relevant market and in one or more of the relevant submarkets, General Foods, through its Maxwell House Division, has maintained monopoly power over the production, distribution or sale of regular coffee packaged for sale at retail through all or some of the policies, acts and practices set out and alleged in Paragraph 10 in violation of Section 5 of the Federal Trade Commission Act.

15. In the relevant market and in one or more of the relevant submarkets, General Foods, through its Maxwell House Division, has attempted to monopolize the production, distribution or sale of regular coffee packaged for sale at retail through all or some of the policies, acts and practices set out and alleged in Paragraph 10 in violation of Section 5 of the Federal Trade Commission Act.

16. General Foods, through its Maxwell House Division, has engaged in a course and pattern of conduct which constitutes unfair

methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. [6]

17. In the course and conduct of its business in commerce, General Foods, through its Maxwell House Division, has since October 1971 discriminated and is now discriminating in price in the sale of regular coffee packaged for sale at retail by selling such products of like grade and quality at different prices to different purchasers.

Included in, but not limited to, the discriminations in price as above alleged, respondent has discriminated in price in the sale of said products to retailers and other purchasers in the Cleveland and Pittsburgh market areas of its Youngstown, Ohio District and in the Wilkes Barre and Philadelphia market areas of its Philadelphia, Pennsylvania District, and in each market area of its Syracuse, New York District by charging said retailers and other purchasers substantially lower prices than charged by said respondent for the sale of said products of like grade and quality to retailers and other purchasers located in other of respondent's trading areas throughout the nation, including at times other of the market areas described herein.

The effect of such discriminations in price by respondent in the sale of regular coffee packaged for sale at retail has been or may be substantially to lessen competition or to tend to create a monopoly in the line of commerce in which said respondent is engaged, or to injure, destroy or prevent competition between respondent and its competitors in the production, distribution or sale of such products.

The discrimination in price as herein alleged violate subsection 2(a) of the Clayton Act, as amended.

INITIAL DECISION BY

LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

JANUARY 25, 1982

I. HISTORY OF THE PROCEEDING

The Commission issued its complaint in this case on July 14, 1976. It charges General Foods Corporation with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 and Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a).

The complaint alleges that General Foods, through its Maxwell House Division, has used and is using its dominant position in regular coffee and its size and economic power to frustrate the growth of smaller regular coffee producers, to frustrate the entry of other regular coffee producers into certain relevant markets, and to prevent, hinder or lessen competition in the production, distribution or sale of regular coffee packaged for sale at retail in the relevant markets. The complaint claims that General Foods achieved these results by selling regular coffee below cost or at unreasonably low prices, [2] by using extensive consumer and trade promotions and advertising to forestall or foreclose market entry or to lessen competition, by engaging in geographically discriminatory pricing, promotional and advertising practices, by increasing advertising and promotional expenditures in previously established marketing areas of a new entrant to deter its entry into the relevant markets, and by using a fighting brand to forestall or foreclose entry or lessen competition.

According to the complaint, the effects of these practices have been the monopolization of the production, distribution or sale of ground coffee packaged for sale at retail, the increase of entry barriers, the preservation of highly concentrated market structures, the hindering of competition and the deprivation to consumers of the benefits of free and open competition.

After extensive discovery, hearings began on August 20, 1979. They ended on June 19, 1981. Over twelve thousand pages of testimony were recorded and several thousand pages of documents were received in evidence. The record was closed on June 26, 1981. Complaint counsel filed their proposed findings of fact and conclusions of law on August 27, 1981. General Foods filed its answer to the findings on October 26, 1981 and complaint counsel filed their reply on December 2, 1981. At my request, the Commission granted me an extension of time to January 26, 1982 to file this initial decision.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and answers thereto filed by the parties. I have adopted verbatim several findings proposed by complaint counsel and counsel for General Foods. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. *General Foods Corporation*

1. General Foods Corporation is a Delaware corporation with its principal executive offices located at 250 North Street, White Plains, New York (Complaint ¶2, Answer ¶3). It is one of the world's leading processors of packaged grocery products and [3] markets a variety of these products in the United States under more than thirty major

brand names (CX 438B).[1]

2. In fiscal year 1972 (year ending April 1, 1972),[2] General Foods had net world-wide sales of over $2.5 billion and net earnings (from continuing operations) of approximately $113 million. In fiscal year 1976, General Foods had net world-wide sales of approximately $4 billion and net earnings of over $150 million (CX 438F).

3. Coffee is one of General Foods' principal product lines (Complaint ¶3; Answer ¶4). From April 1971 through April 3, 1976, General Foods' domestic coffee sales made up from 26% to 30% of its consolidated net sales (CX 438B). Regular coffee (coffee processed from unroasted coffee beans, as distinguished from soluble (instant) coffee) (Complaint ¶11(a); Answer ¶2) constituted a substantial portion of such coffee sales (Complaint ¶3; Answer ¶4). The sales volume of the regular coffee products sold by General Foods' Maxwell House Division approximated $380 million in fiscal year 1971, $386 million in fiscal year 1972, $433 million in fiscal year 1973, $504 million in fiscal year 1974, $529 million in fiscal year 1975, $567 million in fiscal year 1976, and $900 million in fiscal year 1977. In these years, earnings before taxes for all ground coffee products approximated: $26 million in 1971, $24 million in 1972, $13 million in 1973, $17 million in 1974, $5 million in 1975, $25 million in 1976, and $51 million in 1977 (CX 991A–N).

4. General Foods' largest selling regular coffee brand during the relevant time period was Regular Maxwell House. For the following fiscal years, the sales volume and earnings before taxes (in parentheses) for that brand approximated: $303 [4] million ($21 million) in 1971, $293 million ($19 million) in 1972, $300 million ($9 million) in 1973, $351 million ($4 million) in 1974, $369 million (loss of over $1 million) in 1975, $395 million ($22 million) in 1976, and $654 million ($35 million) in 1977 (CX 991A–N).

B. *Interstate Commerce*

5. In the conduct of its business, General Foods' Maxwell House Division distributes regular coffee packaged for sale at retail to purchasers located in states other than the state in which the shipments originated as part of a constant course of trade and commerce in

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[1] The following abbreviations are used in this decision:

CX – Commission Exhibit
RX – Respondent's Exhibit
Tr. – Transcript of testimony
CPF – Complaint counsel's proposed findings
CLA – Complaint counsel's legal argument
RPF – Respondent's proposed findings
RLA – Respondent's legal argument
CRF – Complaint counsel's reply findings
CRLA – Complaint counsel's reply legal argument

[2] General Foods' fiscal years run from April through March of the following year (CX 438B).

regular coffee between the state of origin and purchasers located in other states and the District of Columbia (Complaint ¶13; Answer ¶14).

6. General Foods produces its regular coffee products in four plants in the United States: Hoboken, New Jersey; Jacksonville, Florida; Houston, Texas; and San Leandro, California. Its products are shipped from these plants to locations throughout the United States (CX's 387–94; Tr. 5123–25).

C. *Regular Coffee Producers*

7. Green coffee beans constitute the principal cost component in the production of regular coffee packaged for sale at retail (CX 438B). These beans are all imported into the United States (Tr. 4772).

8. Regular coffee is manufactured by roasting the green beans, grinding and blending different types of roasted beans to achieve certain taste characteristics, and then packing the product in vacuum packed cans or in bags for distribution (Tr. 4828). The manufacture of ground coffee is not a capital intensive industry (Tr. 129).

9. Regular coffee is marketed in three pack sizes—one pound, two pound and three pound (Tr. 1627) and comes in different grinds—regular, drip, fine, and all purpose, as well as grind or blend variations suited for use in electric percolators and in automatic drip coffee makers. There are decaffeinated regular coffee products, coffee products that contain chicory or other extenders, coffees that are "premium blends," and expresso coffees. Coffee is also marketed in premeasured filter rings or pouches. Recently, manufacturers [5] have introduced increased cup yield coffees which deliver increased cup extraction as a result of different roasting and grinding processes (Tr. 4837–49).

10. There are several large firms currently operating in the regular coffee industry in the United States: General Foods Corporation; The Procter & Gamble Co., which markets the Folger's and High Point brands; The Coca-Cola Co., which markets the Maryland Club and Butternut brands; Nabisco Brands, formerly Standard Brands, which markets the Chase & Sanborn brand; The Hills Bros. Coffee Co., Inc., a wholly-owned subsidiary of Copersucar, a Brazilian conglomerate; and The MJB Coffee Co. (Tr. 2122, 3224, 4496, 10,541).

11. Many major retail chain grocery stores produce or have produced for them their private brands of coffee which are sold in their stores in competition with brands sold by independent coffee manufacturers (CX 437F; Tr. 12,335). Some of the larger chains selling their own brands of coffee are The Kroger Co., the Great Atlantic and Pacific Tea Company ("A&P"), Safeway, and First National/Pick 'N Pay (Tr. 1641, 6276, 9538).

12. There are also a substantial number of smaller roasters, many of whom are significant factors in their areas of distribution: Chock Full O'Nuts Co.; American Maize Co., which markets the Savarin brand; J. Lyons & Co., which markets the Martinson's brand; and the JFG Coffee Co. (Tr. 4278–82, 8338, 10,527).

D. *The Consumption Of Regular Coffee*

1. The Use Of Regular Coffee As A Traffic Builder

13. During an average three-month period, 80% of households in the United States purchase regular coffee at least once. During a 13-week period, these households purchase, on average, 7 1/2 pounds of coffee (CX 190B).

14. Retailers who sell ground coffee recognize that their customers are very sensitive to its retail price. Mr. Theodore Engel of the Kroger Co. testified that it regards regular coffee as a "board item," a term used to identify "the basic items we feel from experience are the most price-sensitive items that we carry . . ." (Tr. 1707).

15. Maxwell House Division documents also disclose the importance of price to regular coffee consumers: [6]

> Consumers have been educated to buy ground coffee on price. Ground coffee shares are dramatically responsive to changes in price levels vs. competition. Many people buy every week or two (CX 20Z–38).
>
> Retail price is an extremely important factor in the ground coffee industry affecting both coffee market trend and shares of individual brands within it (CX's 38Z–30, 39Z–17, 40S).

16. This sentiment was echoed in a May 1973, Procter & Gamble memorandum:

> [a]ll our experience in the coffee business tells us that it is extremely responsive to pricing; and pricing equity is regarded as a necessity even in areas where we have a strong leadership share position (CX 524).

17. Because of this consumer attitude toward regular coffee, it has "historically been an actively merchandised category by the Grocery Trade—promoted as a 'traffic builder' or a 'loss leader' " (CX 190B), and this attitude has "led to the use by retail grocers, of coffee as a trade building item" (CX 205A).

18. Louis Epstein, president of Golden Dawn Foods, Inc., a company that wholesales groceries to a voluntary group of supermarkets in western Pennsylvania and eastern Ohio, has purchased ground coffee from manufacturers since 1970 (Tr. 12,157–60). According to Mr. Ep-

stein, it is a "common practice" in the grocery business to sell a highly desirable item such as coffee at a reduced price to attract consumers:

> [T]he assumption being that if a consumer walks into the store for the reason of buying that product at a very low price, she will buy the rest of the order there and then you will balance out and make money on the balance of the order. That is loss leader selling and it's a common practice in the industry (Tr. 12,187; *see also* Tr. 2881, 5753, 5818, 5938, 6611). [7]

19. David Graham, who had extensive experience first in the marketing of ground coffee brands produced by General Foods, and was thereafter vice president and general manager of the Martinson Division of the Squibb Corporation, responsible for the marketing of Martinson's and Beechnut coffee brands, and who later participated at Standard Brands in major management decisions affecting the Chase & Sanborn brand of coffee, testified that coffee is an "extremely competitive" industry. Certain characteristics make it particularly competitive. It is a large category in terms of physical volume and dollar sales, and represents a "very meaningful part" of the total revenue of grocery store sales. It is a product which is widely consumed and purchased frequently, and it is used by grocers to draw people into their stores (Tr. 10,536–37).

2. The Trend In Regular Coffee Sales And The Increase In Competitive Activity

20. In fiscal 1968, the consumption of regular coffee in the United States peaked at 122.4 million units, or 1.468 billion pounds (RX 1105B). In the next ten years, regular coffee consumption declined by almost one-third (Tr. 4335–36).

21. This decline in consumption has caused manufacturers of ground coffee to intensify their promotional activity in order to maintain their business (Tr. 5722). Any coffee company seeking business in new areas of distribution would have only one source for this business, from the other brands existing in that area (Tr. 4336). Hills Bros. recognized that Procter & Gamble's expansion of Folger coffee did not expand the ground coffee market, but that Folger's obtained its share by taking it from other brands (Tr. 2196).

22. Several Maxwell House Division documents indicate that as a result of this decline in consumption, producers have increased marketing expenditures in an attempt "to maintain volumes in a declining market" (CX 17T) and that trade promotion expenditures have increased because producers realized that it was necessary and more efficient to trade promote in order to utilize more capacity (CX 20Z–38). Local and regional roasters' reliance on trade dealing as their

single marketing tool is "reflective of incremental economies in an industry with idle capacity" (CX 190B).

23. The importance of this decline in consumption and attendant increased marketing expenditures was recognized within [8] the Division as a potential cause of increased competitive activity by roasters:

> Folger, in quest of "at least" static volumes in a declining ground market, will continue to grow in their established markets with accelerated trade spending.
>
> Hills, MJB and other competition will continue to lose share intensifying trade spending along the way.
>
> In the HFNI, Savarin, CFON, C&S and Martinson's will continue to spend to solidify share (CX 16H; *See also* CX's 13M, 15D, 16Z–36).

24. This increase in competitive activity has not been limited to just a few of the Maxwell House Division's sales districts but is a nationwide phenomenon (CX's 659B, 670A, 672C, F, 673D, 677A, C; RX 1207A–C, F).

E. *The Marketing Of Regular Coffee By The Maxwell House Division*

1. Introduction

25. During the 1960's, its Maxwell House Division accounted for approximately 35% of General Foods' profits (Tr. 4495). The Division's major regular coffee brand is Regular Maxwell House; other brands sold by the Division are Maxim, a freeze-dried coffee, Sanka, which is produced in freeze-dried, regular and soluble form, Yuban, a premium coffee, Brim, a decaffeinated ground and freeze-dried coffee, and Master Blend, Electra-Perk, ADC, Mellow-Roast and Max-Pax, which are regular coffees (Tr. 4492–93, 4836–37, 4847–48, 4858).

2. The Marketing Mix

26. Prior to fiscal 1972, the Division's coffees were sold in 27 sales districts. In fiscal 1972, the Division's national sales manager reduced the districts from 27 to 20 and extended [9] the boundaries of the remaining sales districts. The districts contain 52 marketing areas. The Division's coffees are sold direct to retail grocers and to wholesalers. Of the 200,000 retailers in the United States, some 30,000 are sold direct; the remaining 170,000 buy their Maxwell House Division coffees from wholesalers (Tr. 5723, 7130–31, 7159). The Maxwell House Division (and other roasters) promotes its coffee products through a so-called "marketing mix" which consists of advertising, trade dealing and consumer promotions (Tr. 7115).

27. Advertising, or "media," consists of television programming,

magazines, newspapers, Sunday supplements, radio, and outdoor billboards. Television advertising is either network or spot. Network advertising is bought from the major networks, CBS, NBC and ABC, in New York City. Spot advertising is purchased from local television stations (Tr. 7820).

28. Trade deals consist of non-performance and performance allowances which are offered to the Division's retail customers (when the Division sells to wholesalers, these allowances are passed on to the wholesalers' customers) (Tr. 7130–31).

29. Non-performance allowances such as buying allowances are discounts from the list price for each case of coffee. The retailer is not required to perform in order to receive the allowance (Tr. 1374–75, 5754).

30. A performance allowance is a discount from the list price for each case of coffee, with the requirement that the retailer engage in specified performance. Performance allowances include display allowances, advertising allowances, reduced price features and count and recount. A display allowance requires that the retailer display the coffee in a particular fashion. An advertising allowance requires that the retailer advertise the product in order to get credit for the allowance on all volume purchased. A reduced price feature requires the retailer to reduce the price of coffee to the consumer. A count and recount is an allowance based on cases moved from the trade's warehouse to the retail store serviced by that warehouse (Tr. 5846–47, 6655–56).

31. Consumer promotions take the form of coupons, of which there are two basic types: consumer coupons and retailer coupons (RECUs). Retailer coupons (RECUs) are coupons that a retailer runs in its newspaper advertisement which offer the consumer a discount on the purchase price of a particular brand. When the consumer buys the product and presents the coupon to the retailer, the consumer receives a price reduction equal to the face amount of the coupon. Upon submittal of the coupon to a manufacturer, the retailer receives an amount equal [10] to the price reduction from the manufacturer (Tr. 2009–10, 2505, 2747, 12,100–03, 12,183). Consumer coupons are redeemed like RECU's by the retailer, but they are either mailed direct to the consumer by the producer ("DMCU"), appear in newspapers or magazines ("NECU"), or are packed in the product ("PIC's") (Tr. 1601, 2013–14, 2505–06, 2725). RECU's are effective for a four-or-six-week period. During this period, a retailer can only participate once in the RECU offer and the RECU must expire within a week from the date of publication (Tr. 5846, 5998, 7123). Consumer coupons can be redeemed for an indefinite period (Tr. 4114).

F. *Folger's Entry Into The HFNI*

32. Although Regular Maxwell House is sold nationwide, the bulk of its volume has traditionally been sold in the "HFNI," an acroynm for "High Franchise Non-Infringement." The HFNI is the area of the United States east of the Mississippi River where Regular Maxwell House has been the leader in regular coffee sales. In the western part of the United States, the so-called "Low Franchise" area (CX 448A–C; Tr. 1398–99), Regular Maxwell House has been faced with competition from the leader in that area, the Folger Coffee Company (Tr. 2709–10, 4502).

33. The Maxwell House Division's major competitor has been and is the Folger Coffee Company. In 1963, Folger was acquired by the Procter & Gamble Company (Tr. 4506) and, until the fall of 1971, restricted its competitive activities, with minor exceptions (some sales in Indiana, Cincinnati, Ohio, and Florida), to the western United States (Tr. 2709–10, 4502).

34. In October 1971, Folger began selling its coffee in Cleveland, Ohio as a test market, with the intention, if its introduction into this market were successful, to expand into the balance of the eastern United States on an orderly schedule (Tr. 2710–11). After waiting for three months, the Maxwell House Division decided to respond to Folger's eastern thrust. It is this response to Folger's entry into Cleveland and other eastern areas and the consequent results which prompted the Commission to issue the present complaint.

G. *The Relevant Product Market*

35. The parties have agreed that the relevant product market is all regular coffee products packaged for sale at retail, including caffeinated, decaffeinated, and extended [11] ground coffee products (Prehearing Conference, April 12, 1978, Tr. 79–84).

H. *The Relevant Geographic Market*

1. Introduction

36. While Dr. Kenneth Elzinga, General Foods' major economic expert, agreed with few of the conclusions drawn from this record by Dr. H. Michael Mann, complaint counsel's main expert,[3] he and Dr. Mann agreed that a relevant market is an "area that encompasses the primary demand and supply forces which determine price" (Tr. 3528, 9415, 9456–57). However, as is not uncommon when economists (or lawyers) apply a simple principle to a concrete factual situation, the experts' conclusions differed: Dr. Elzinga testified that the relevant

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[3] Dr. Elzinga is a professor of economics at the University of Virginia (Tr. 9401). Dr. Mann is a professor of economics at Boston College (Tr. 3515).

geographic market for coffee is probably nationwide (Tr. 9430), while Dr. Mann stated that the market is no larger than a General Foods sales district (Tr. 3527).

37. The following discussion analyzes the demand forces which are emphasized by Dr. Mann and complaint counsel and the supply forces which Dr. Elzinga and counsel for General Foods claim are the primary forces which define the relevant geographic market.

2. The Demand Forces

(a) *Industry Recognition*

(1) General Foods

38. General Foods recognizes in dealing with its customers that the demand for regular coffee is not uniform throughout the nation but that it differs from area to area. [12]

39. General Foods' fiscal 1971 marketing plan[4] for Maxwell House is an example of the way it views the demand for coffee:

> *Ground Coffee Market Structure - The National Markets vs. The Market Places.*
>
> - National shares are only an average of widely divergent market places, because RMH[5] and Folger are strongly regionalized and smaller brands have only local zones of influences. *National share relationships have little relevance to the structure within a marketplace.*
>
> - No *region, district, market area or dealing area even vaguely resembles the national profile!* (Emphasis in the original.)

It is in each market place that consumers purchase coffee and the structure of the individual marketplace is the arena that defines the choices the consumer has. To influence her choice marketing efforts must be tailored to her marketplace (CX 20Z-37).

40. Other statements in General Foods documents reveal the less-than-national demand forces which it faces when it markets its coffee products:

> BACKGROUND
> THE GROUND COFFEE MARKET STRUCTURE
>
> *IMPLICATIONS*
>
> *Marketing Strategy*
>
> - In the ground coffee market, a flat national dealing/spending level is not a good fit of marketing strategy to market structure. [13]
>
> - Due to the responsiveness of ground coffee shares to changes in price, RMH must

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[4] Marketing plans are statements of brand objectives and brand strategies and outline the strategies to accomplish those goals (Tr. 1521).

[5] Regular Maxwell House.

> respond to market-by-market conditions to remain competitive to locally powerful brands.
>
> The effectiveness of broad marketing programs like advertising and consumer promotion, depends on RMH's ability to neutralize the impact of on-shelf/feature differentials vs. competition as and where they occur (CX 20Z-39).

41. The fiscal 1976 marketing plan, under the heading "dealing principles" states: "Trade deal on [a] market by market basis to achieve Brand's overall objectives" (CX 19A, Z-26; *see also* CX 18Z-16). The fiscal 1976 media plan for Maxwell House describes planned media expenditures for that year and states: "the Brand's base budget was allocated by dollars by market according to the Brand's Development Index" (CX 457S).

42. The fiscal 1975 marketing plan contains a chart, "RMH Financial Summary Fiscal 1975," that shows differences in trade and consumer promotions between the sales districts of Youngstown, Philadelphia, Kansas City, and Dallas (CX 63S). Another chart contains a series of statements reflecting differences in trade dealing strategy for Maxwell House in each sales district (CX 63Z-15).

43. The fiscal 1974 marketing plan under the heading "Deal Strategy" states: "RMH uses case rates tailored to each market to achieve parity shelf pricing" (CX 15Z-8).

44. The fiscal 1972 marketing plan contains a section entitled "Consumer Promotion" (CX 13Z6). In this section, individual markets are broken down into four categories, with examples given of each: (1) "Shelf Market-Strong Franchise" (examples: Washington, Memphis); (2) "Feature Market-Strong Franchise" (examples: New York, Cincinnati); (3) "Shelf Market-Weak Franchise" (example: Los Angeles); and (4) "Feature Market-Weak Franchise" (examples: San Francisco, Dallas). Separate regular Maxwell House consumer promotion objectives and strategies are listed for each category of markets (CX 13Z8-9).

45. The fiscal 1971 marketing plan indicates that Regular Maxwell House media funding was allocated on a district-by-district basis according to several factors, including Folger's media spending (CX 12P; *see also* Tr. 1177). [14]

46. Still more General Foods documents contain statements and tables indicating that demand conditions differ between its sales districts:

a) The "State of the Business," contains a chart entitled "Trade Spending Analysis FY '75 AFP" that shows differences among Maxwell House Division sales districts in terms of Maxwell House trade dealing strategies (CX 17Z1).

b) The March 1, 1976, "Trade Promotion Review," states: "Overall, trade dealing provides a mechanism for implementing market-by-market pricing action, consistent with the nature of the industry and competitive circumstances" (CX 190C, CX 191C).

c) The August, 1976, "RMH Trade Dealing Principles Review" tracks Maxwell House share versus competition for each district, market area, and dealing area (CX 195A–Z8). Depending on the Maxwell House to competitor share ratio, Maxwell House dealt at a different level, keying only to certain competition (CX 1950). Under the heading "How Deal Levels Are Calculated," the document explains how General Foods calculates Maxwell House trade dealing levels separately for each market "depending on the RMH to competitive share ratio" with lower deal levels being designated for areas in which Maxwell House's market position is stronger (CX 195T; *see also* CX 194Q).

d) A 1975 "RMH Trade Dealing Principles" document states: *"The RMH trade principles are based on pack size franchise relationships to competition on an individual market basis"* (CX 188B, emphasis in original). This document also states that Maxwell House's "specific dealing programs are on an individual market basis" (CX 188B).

e) A "Regular Maxwell House Trade Dealing Review" analyzes on a sales district by sales district basis the different competitive factors in each sales district (CX 187R–Z1, CX 187Z3–14). [15]

f) In another "RMH Trade Dealing Principles Review," General Foods again recognized that it must deal with different demand forces from area to area:

> Offers by RMH must be structured to appeal to each area's trade factors with an understanding of their merchandising policies, RMH's relative pack size strengths and competitive offer levels (CX 194D).

47. The marketing plans of other General Foods brands also reveal General Foods' perception that customer demands differ from area to area. The following are examples:

a) The Brim fiscal 1977 marketing plan states that Brim's trade promotion spending would be initiated to provide "[m]erchandising support for drive period promotions on a responsive district basis only." (CX 61N).

b) The fiscal 1976 marketing plan for Max-Pax contains an outline that shows separately for individual Maxwell House Division sales districts and market areas the estimated trade rates per unit for Max-Pax and the trade deal strategies to be followed by Max-Pax in fiscal 1976. The outline reveals differences among the Maxwell House Division sales districts and market areas in relation to these factors (CX 44Z17–20).

c) The fiscal 1974 Yuban marketing plan contains a chart entitled

"Trade Deals/Pricing Objectives" that shows differences among Maxwell House Division sales districts in terms of Yuban's trade deals and pricing objectives for fiscal 1974 (CX 35Z3).

d) The fiscal 1975 Yuban Marketing Plan under the heading "Spending Principles" discusses the concentration of advertising effort in particular sales districts and states:

> Beginning in F' 74, Yuban's basic spending strategy will be to concentrate the Brand's advertising and [16] promotion expenditures in key markets only. This "concentration" strategy recognizes that the greatest areas for growth for Yuban lie in current areas of strength where the brand already possesses consumer/trade leverage. Seven districts (N.Y., Boston, Dallas, St. Louis, Portland, San Francisco, Los Angeles) which account for approximately 80% of Brand volume will receive all the Brand's media support and over 90% of its promotion expenditures (CX 35U–V).

48. As would be expected from the above statements, General Foods' marketing strategies are tailored, in many cases, to individual Maxwell House sales districts or market areas. Maxwell House's assistant product manager, who was responsible for selling volumes and deals, allocated deals to individual sales districts with the objective of delivering certain volume or share levels in a sales district (Tr. 1373, 1376–78).

49. The Maxwell House Division regional sales managers set volume targets for each of the districts (Tr. 6457, 6501, 6603). They also reviewed the regular coffee pricing situation in their regions on a district-by-district basis (Tr. 6658, 6663). Each of the district managers was assigned certain volume objectives, and based on these objectives, certain deals were authorized for those areas in order for the district managers to accomplish the objectives (Tr. 1378).

50. Trade deals were cut for each sales district separately. The same trade deal was never cut for the entire country (Tr. 1377–78), and trade deal rates generally differed among sales districts (Tr. 1660, 1963, 5815–16, 5828).

51. Advertising levels for the Regular Maxwell House brand also varied among sales districts (CX's 12P, 457S, 794A–D).

52. The reason that the Maxwell House Division offered varying deals in different districts is that levels of competition differed between the areas (Tr. 7159). By way of illustration, Mr. Keller, Division's southern region sales manager, testified:

> . . . I would love to have one deal that I could run the entire region. But there are too many local competitors and too many [17] different competitors and different competitive situations in each of the markets that doesn't allow me to do that. It doesn't allow me to be—to run one deal—and as a result I need to have different deals in different districts (Tr. 6675).

53. In some cases, the Maxwell House Division even offered trade deals in an area smaller than a sales district (Tr. 5815). For example, before Folger entered Cleveland, the Maxwell House Division dealt the Youngstown sales district as an entity (Tr. 7161). After Folger entered Cleveland, the Division responded to Folger's entry only in Cleveland instead of the entire Youngstown sales district (Tr. 4554, 7161–62). The Division's increases in its trade rates, consumer promotions, and advertising in response to Folger's entry in Cleveland were limited to the Cleveland area because the need for them only arose in that area (Tr. 5833–34).

54. When the Maxwell House Division responded to Folger's entry into Pittsburgh, it limited its response to the Pittsburgh market area (Tr. 4554–55, 7161–62), and its increases in trade promotions, consumer promotions, and advertising in response to Folger's entry into Syracuse did not extend beyond the Syracuse sales district (Tr. 5836, 5997–98, 6022–23, 6103, 7162).

55. When the Maxwell House Division responded to Folger's entries into the Philadelphia and Syracuse sales districts, part of its response was the introduction of a new regular coffee brand, Horizon. Horizon's introduction was limited to the Wilkes-Barre/Scranton market area of the Philadelphia sales district and to the Albany market area of the Syracuse sales district. Its entry was timed to coincide with Folger's entry into these areas (Findings 424–27).

56. When Maxwell House Division responded to Folger's entries into Cleveland and Pittsburgh, part of its response involved increased advertising and deal rates in two of Folger's largest and most profitable areas, Kansas City and Dallas (Findings 428–30).

57. The same area-by-area response by the Maxwell House Division occurred when a competitor, Hills Bros., expanded eastward in the late 1960's (Tr. 4555, 5837, 6097–99).

58. The Maxwell House Division also maintains records of certain business activities on a district, or smaller, basis: "district profitability" statements show the following categories of information with respect to Regular Maxwell House [18] for each Maxwell House Division sales district: (1) "Volume Units"; (2) "P/S/S" (pack size split); (3) "C.M." (contribution margin); (4) "G.P." (gross profit); (5) "Trade Deals"; (6) "Consumer Deals"; (7) "Total Deals"; (8) "Advertising"; (9) "All Other"; and (10) "PBIT" (profit) (CX 424A–B). The Division also maintains records of sales volumes for its regular coffee products on a market area and sales district basis (Tr. 5830), and generally calculates volume objectives for Regular Maxwell House sales promotion plans by sales district or marketing area (Tr. 10,610).

59. In addition, the Maxwell House Division maintains history data on the amount of trade rates in various eastern markets (Tr. 1587),

develops "deal close" documents which show deal rates in each sales district (CX 136A–G; Tr. 1404–05), and in its weekly deal control documents, records deals on a market area by market area basis (CX's 1061, 1064).

60. The Division also gathered Nielsen data showing the market share for each of its regular coffee brands and for its competitors on a sales district basis and sometimes on a market area basis (RX's 1106–07; Tr. 4328–30), and one of its advertising agencies, Ogilvy & Mather, prepared summaries of Regular Maxwell House's advertising expenditures by sales district (Tr. 1177). In addition, Ogilvy & Mather prepared summaries of advertising expenditures by Regular Maxwell House and Folger in various local markets (Tr. 1543).

(2) The Maxwell House Division's Competitors

61. The Maxwell House Division's competitors also recognize that demand forces for regular coffee differ from region to region and take these differences into account when they market their coffee.

62. Mr. Allen Toy, vice-president of corporate development of Hills Bros. (Tr. 1991), testified that his company's sales promotion areas were established for the purpose of setting deal promotions with customers in those areas (Tr. 2006). While Mr. Toy is only generally aware of the dealing areas of his competitors, he believes that all competitors would consider major metropolitan areas as part of one promotion area. Differences between competitors' trade areas would occur between cities. For example, the area between Cleveland and Pittsburgh could be included in one sales district for General Foods and another one for Hills (Tr. 2008). [19]

63. Hills Bros. offers different deals, including different consumer deals in different promotional areas, as does its competitors (Tr. 1660, 2016–18). Its advertising levels also vary among its promotion areas (Tr. 2021).

64. Folger divides the country into smaller geographic areas called "sales promotion areas" (Tr. 2907). The boundaries of Folger's sales promotion areas were designed to comport with the areas in which Folger's competitors were making their offers (Tr. 2907–08), and these areas compare very closely with those of its competitors (Tr. 2908).

65. Folger sets its trade deals by promotional areas, and there are differences in Folger's dead-net prices among its sales promotion areas (Tr. 2908–09).

66. According to Mr. David W. Graham, who worked for both Standard Brands, which markets Chase & Sanborn coffee and Martinson/Beechnut (Tr. 10,526–28), Standard Brands' sales districts were generally similar to the Maxwell House Division's, with one difference—the Division, at the time he was talking about, had 20 sales districts,

while Chase & Sanborn had 23. In the case of Martinson/Beechnut, he estimated that there was probably 95% agreement between its sales districts and Maxwell House's (Tr. 10,643).

67. Hills Bros., Folger and Standard Brands kept records of or studied certain business activities (trade and consumer deals, advertising, and profitability) by district (CX 866I; Tr. 2019, 3152–56, 3169, 10,658).

(b) *Wholesale And Retail Distribution*

(1) Grocery Distribution Patterns

68. Mr. John J. MacDonald, a long-time employee of General Foods' Maxwell House Division testified that: "There are no national retailers. None. There are no national wholesalers. Each of them fills a particular piece of geography" (Tr. 7159). Within their particular piece of geography, wholesalers and retailers may use multiple buying offices and several distribution centers. For example, Kroger purchases its regular branded coffee in fourteen locations for delivery to its nineteen distribution centers (Tr. 1660), and Flickinger's, a wholesale grocery company located in Buffalo, New York, has six branches in New York, Ohio and Pennsylvania (Tr. 11,845). [20]

69. The Maxwell House Division and other coffee producers recognize that the demand for their products varies between sections of the country and structure their sales and promotion practices accordingly. The Division's sales districts and the distribution system that accompanied them were set up to match the particular needs of the retail coffee business (Tr. 4557). The actual pattern of retailer locations and the distribution to those retailers of coffee from General Foods' plants were among the many factors considered in determining what areas should constitute separate sales districts (Tr. 4557), and these factors continued to be considered in delineating sales districts during the 1970's (Tr. 4558).[6]

70. According to Mr. Toy of Hills Bros., all industry members consider major metropolitan areas as one promotion area. A city like Cleveland could not be separated into two promotion areas because retailers in Cleveland cover the city wide area. Differences among the dealing area boundaries of industry members only exist in outlying areas (Tr. 2008).

71. The most important factor that Hills Bros. considers in establishing its sales promotion areas is the retailers' areas of distribution. This is most important because it is "a very difficult job to sell if you

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[6] On the other hand, the Maxwell House Division's decision in 1972 to reduce the number of sales districts (Finding 26) indicates that factors other than customer demand were important considerations in setting up district boundaries.

cut across the retailer's warehouse distribution area."[7] Hills Bros. includes all the stores receiving products from a warehouse in a single sales promotion area (Tr. 2007). Hills Bros. also aligns sales promotion areas to retailers' needs to minimize transshipment problems (Tr. 2022).

72. Folger's sales promotion areas were also designed to reflect trade distribution boundaries. These boundaries are the areas to which the wholesale and retail trade ship their products (Tr. 2907–08). [21]

(2) Overlap Of Sales Districts And Grocery Distribution Patterns

73. Complaint counsel commissioned a study by Audits and Surveys in an attempt to demonstrate that there is a correlation between the buying and warehousing patterns of grocers and the boundaries of Maxwell House sales districts. Mr. Richard Lysacker, president of this firm, testified about the study which it conducted. Mr. Lysacker has had extensive academic and business training in survey techniques and statistics (Tr. 1743–52).

74. Mr. Lysacker's study analyzed for 1971 and 1973: (1) the extent to which merchandise flows from wholesaler warehouses located in a sales district to stores located in that same district; and (2) the extent to which General Foods' sales districts align with retail market areas defined by an independent source that considered grocery distribution patterns (Tr. 1811–12).

75. The *Grocery Distribution Guide* is an annual report containing data that identifies the locations of grocery warehouses and the retail stores that the warehouses supply (Tr. 1791–92), and it was used by Mr. Lysacker to analyze to what extent food sold in grocery chain stores within Maxwell House sales districts were also warehoused in those districts (or outside of them) (Tr. 1795).

76. Mr. Lysacker satisfied himself that the *Guide* was accurate by having his staff conduct 200 randomly selected interviews with chain warehouses and buying offices and he concluded (a) that the interviews demonstrate that coffee is warehoused in the same location as other food products included in the *Guide* and (b) that his study applies, therefore, to coffee as well as to grocery products in general (Tr. 1812–13, 1818–19, 1856–57).

77. Mr. Lysacker's analysis of warehouse distribution patterns in 152 metropolitan areas for 1971 and 1973 led him to conclude that merchandise sold in a sales district was by and large also warehoused in that same sales district (CX 1029A–C; Tr. 1798).

78. This analysis reveals, according to Mr. Lysacker, that for 1971

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[7] And, as will be discussed below, this phenomenon often leads to a breakdown in the containment of demand forces within sales districts.

and 1973, 96% of the grocery products sold within a Maxwell House Division sales district were also warehoused in the same sales district and that trade flow across district boundaries was minimal. The 96% figure is an average among sales districts weighted on the basis of area volume (CX 1029A–C; Tr. 1914–15). [22]

79. Mr. Lysacker conceded that in the northeast, some shipments cross sales district boundaries, but, according to him, the amount is only 3% in Boston, 4% in New York, 6% in Philadelphia and 6% in Syracuse (Tr. 1917–18).

80. *Progressive Grocer* is a widely used marketing guide book that supplies numerous details relating to the grocery business in 79 different marketing areas. These areas were developed by taking into account merchandise flow between retail stores and warehouses that service them and media coverage patterns (Tr. 1761–63).

81. After comparing maps of General Foods sales districts with the *Progressive Grocer* marketing areas[8] (CX's 1017A–Y and 1018A–L), Mr. Lysacker concluded that the sales districts had a "strong degree of correspondence" with the *Progressive Grocer* marketing areas (Tr. 1770–71; CX 1027A–E).

82. Although Mr. Lysacker's study of Maxwell House Division sales districts and *Progressive Grocer* market areas reflected, in his opinion, the alignment of sales districts with television markets, he also undertook an analysis focusing specifically on how television reception areas correspond to the boundaries of Maxwell House Division sales districts (CX 1015A–F; Tr. 1778–91).

83. Arbitron is a company that measures television on a market-by-market basis (Tr. 1778–79). It constructs advertising coverage areas that encompass the geographic area predominantly served by the stations located within each area (Tr. 1779–80). These 210 areas are referred to as ADIs (areas of dominant influence) (Tr. 1778–80). Interviews with television viewers are used to establish the ADI to which an area will be assigned (Tr. 1779–80).

84. A comparison of the Maxwell House Division sales districts and Arbitron's ADI areas was made using a random sample of six sales districts for 1971 (CX 1028A–C; Tr. 1781– [23] 85), and Mr. Lysacker believes that there is a high degree of correspondence between Maxwell House Division sales districts and ADI areas, and that the spillover of advertising messages across sales districts is relatively small (Tr. 1786–87, 1790). Mr. Lysacker's study indicates that for the sales dis-

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[8] The study compared counties which are included within the confines of both a General Foods sales district and a *Progressive Grocer* marketing area with counties which are included only within a General Foods sales district and counties which are included only in a *Progressive Grocer* marketing area (Tr. 1764). The study revealed that 91% of food sales fell in counties which are common to General Foods sales districts and *Progressive Grocer* marketing areas (Tr. 1767–68).

tricts analyzed, the overlap contained over 90% of the food sales in the combined areas (CX 1028A–C).

(3) Trade Flow And Transshipment

85. Transshipment is the purchase of a product by a retailer for one warehouse and its shipment to a different warehouse in another area (Tr. 1664, 5729–30). Trade flow occurs when a single warehouse serves retail outlets in more than one sales district (Tr. 6558).

86. On the basis of his study, Mr. Lysacker concluded that trade flow was insignificant in 1971 and 1973 and that it did not prevent manufacturers from marketing in a different fashion from one sales district to another (Tr. 1774).

87. Retailers who sell the Maxwell House Division's regular coffee products are free to ship coffee from one district to another, but the Division has attempted to discourage these shipments by announcing that it will not honor offers available in one area when retailers seek to take advantage of that offer in other areas.

(4) Attempts To Limit Trade Flow And Transshipment

88. Retailer coupons may be employed as a method of lessening transshipment (Tr. 5813–14), and one Maxwell House Division retailer coupon assessment states that their use "avoids trade flow problems" (CX 186C). Another trade deal document states that:

> RECU's are financially efficient for RMH and offer the brand a tactical tool to deal with distinct competitive situations where trade flow prevents an economical case rate response (CX 190L).

89. The Maxwell House Division insists that retailer coupons be redeemed only by stores in the sales district or area in which the Division runs the offer (Tr. 5814, 6528). The deal [24] bulletin for a retailer coupon offer defines the district or trade dealing area in which the retailer coupon is to be run (Tr. 6528). Retail chains outside the area in which a retailer coupon offer is made cannot take advantage of the offer unless they have stores within the geographical boundaries of the offer. In such a case, only the retailers' stores within the geographical boundaries can take advantage of the retailer coupon offer (Tr. 5814, 5997–98).

90. For example, if a retailer in the Syracuse sales district ran a coupon that was offered only in the New York sales district, the redemption center would void those coupons redeemed in Syracuse. This would be unauthorized performance, *i.e.*, performance outside the authorized area (Tr. 6095–98).

91. The offer number associated with a particular retailer coupon

offer must appear in the coupon that the retailer prints in the newspaper, and it can be determined quickly whether a retailer coupon offered in one sales district has been redeemed in another sales district (Tr. 5854–55).

92. Under the terms of a Maxwell House Division retailer coupon offer, a consumer could not cut a retailer coupon out of a newspaper ad for Kroger in Cincinnati and redeem the coupon at a Kroger store in Cleveland (Tr. 5853). Controls that exist in General Foods' coupon redemption centers are designed to monitor and control that kind of redemption (Tr. 5854).

93. The Maxwell House Division's promotional announcements limit the geographic area of the offers (Tr. 3555–56). A typical promotion announcement identifies the geographic area in which the offer is available and states that payment on the allowance will be made only on volume shipped to retail outlets located in the offer area (CX 1125).

94. According to Mr. Engle, a Kroger official, the Maxwell House Division would not permit his company to issue a purchase order for regular coffee for delivery at one location at a price being offered by a promotional announcement in another part of the country (Tr. 1662). More specifically, since 1971, the Division would not permit Kroger to issue a purchase order for regular coffee to be delivered in Cleveland at a price being offered by the Division to retailers in Texas (Tr. 1661).

95. Transshipment can also theoretically be controlled by persuasion, restructuring of allowances, and allocations (Tr. 1664). "Allocation" means that a manufacturer will limit retailers' acceptance of offers to a specific number of cases (Tr. 1666–67). [25]

96. Allocation can control transshipment because only the amount of product actually needed for the market in question would be sold to the retailer. The retailer would not be sold enough volume to ship to other areas (Tr. 1666–67).

97. In at least one instance, the Maxwell House Division monitored transshipment. The Syracuse District Action Plan, under the heading "Transshipment Monitor/Control," states:

> The higher case rates on RMH could lead to higher than usual transshipment into neighboring districts. As a means of monitoring this flow of product, *the Brand will continue to ship the Fresh-Lock Lid into the Syracuse District.* This will provide a ready and visible means of tracing the shipment of Syracuse product.
>
> Secondly, *key account purchases will be monitored in White Plains* and compared against historical purchases. Consistent and unusually heavy purchases will indicate transshipment.

> These two monitoring devices will provide data to use in support of discouraging transshipment at our customer headquarters (CX 710K) (Emphasis in original).

In a covering memorandum, Mr. Einloth of General Foods concluded that "we believe we have the means to monitor and, therefore, exercise control with our key accounts" (CX 710A).

(5) The Increase In Trade Flow And Transshipment

98. While Mr. Lysacker does not believe that trade flow between sales districts is significant, his conclusion is based on 1971 and 1973 data, and General Foods has presented evidence which indicates that it is often unable to control trade flow as well as transshipment. In fact, trade flow and transshipment are increasing as wholesalers and retailers expand their trading areas. [26]

99. One example of the Maxwell House Division's inability to discourage transshipment is the result of its monitoring effort described just above. According to Mr. Salesman, the Maxwell House Division Syracuse district manager at the time Regular Maxwell House converted to straight case rates in Syracuse, he received calls from district sales managers across the country reporting the appearance of fresh-lock lid product in their districts (Tr. 5933). Specifically, that peculiarly identifiable product was transshipped from Syracuse to Portland, Oregon, to Los Angeles, California, to Boston, Massachusetts, to Philadelphia, Pennsylvania, to Jacksonville, Florida and to Youngstown, Ohio (Tr. 5934), and the Division's southern region manager testified that Daylight Grocery, a small grocery chain in the Jacksonville area, had fresh-lock lid products on its shelf during the time of the Syracuse test (Tr. 6586).

As explained by Mr. Salesman:

> The rate differential that existed between what they could buy it for in Syracuse and what the trade rate that existed in another area was—the differential was so great that it more than covered the freight cost plus any profit that they might make on that. Transshipping is not only done by the grocery trade, but there are people that we have referred to as bandit brokers, and Wilco and Trepel out of New York have made a business out of this. . . . They know what the going trade [rate] is, and they can buy that coffee in that area and still pay the freight and make a profit on it (Tr. 5934–35).

100. Other coffee producers have also experienced transshipment of their product (CX 540B; Tr. 2909, 10,630).

101. John Mann, the Maxwell House Division's eastern region manager, gave specific examples of transshipment into and out of sales districts in the eastern region. In summary:

> Into the Youngstown District, there is transshipment from the New York, Boston, Chicago and Dallas districts by Seaway, Fisher Fazio, Pick-N-Pay and First National.

> Into the Syracuse District, there is transshipment from the Cincinnati, Philadelphia, New York and Boston districts [27] by S.M. Flickinger, P&C, Grand Union, Price Chopper, Springfield Sugar Co. and C&S Wholesale Grocers.
>
> Into the Cincinnati District, there is transshipment from the Syracuse district by S.M. Flickinger.
>
> Into the Philadelphia District, there is transshipment from the Syracuse and Boston districts by S.M. Flickinger, New England Grocers and C&S Wholesale Grocers.
>
> Into the Boston District, there is transshipment from the Youngstown district by Springfield Sugar Co. (Tr. 6463–72).

102. Because trade flow also occurs, the Maxwell House Division has sometimes offered similar deals to stores in different districts. Mr. Mann testified that trade flow is common in the eastern part of the country (Tr. 6446). Of 86 major grocery trade customers in the eastern region, at least 40 trade flow from one district into another (Tr. 6449). According to other witnesses, trade flow is so widespread that it would be impossible to develop district boundaries to contain it (Tr. 5741, 6288). Because of the prevalence of trade flow, trade deals must be structured to take it into account (Tr. 6575).

103. Over the years, the Maxwell House Division has referred to the Boston, New York, and Philadelphia sales districts and part of the Syracuse sales district as "the complex" because it is a contiguous area in which trade flow necessitates that all the areas be trade dealt together (Tr. 5730, 6454–56). Close to 70% of the eastern region's total volume of coffee sales is so significantly influenced by trade flow in the complex that it is necessary to offer trade deals of an equal value throughout that area (Tr. 6455–56).

104. Mr. James Keller, southern regional sales manager for the Maxwell House Division, and Mr. Mann detailed the regularity of trade flow into and out of districts in their regions. In summary:

> From the Charlotte sales district, there is trade flow into the Philadelphia, Youngstown, Cincinnati, Atlanta and Jacksonville districts by the following trade factors: Rich Foods, Virginia Foods, Acme Stores, Kroger, Merchants [28] Distributors, Thomas & Howard, Engles, Winn-Dixie, Bi-Lo, Piggly-Wiggly and Wetterau.
>
> From the Philadelphia sales district, there is trade flow into the New York and Charlotte districts by the following trade factors: A&P, Safeway, Giant Foods, Food Fair and B. Greene.
>
> From the Youngstown sales district, there is trade flow into the Syracuse, Cincinnati, Detroit, Cleveland and Philadelphia districts by the following trade factors: Betsy Ross, Golden Dawn, Kroger, Seaway, Giant Eagle, Riverside, Fisher Foods, McClain Grocery and Thorofare Supermarkets.
>
> From the New York sales district, there is trade flow into the Syracuse, Philadelphia, Boston and Miami (Jacksonville) districts by the following trade factors: Shop-Rite Stores, Pathmark, Krasdale, White Rose and Waldbaum's.
>
> From the Syracuse sales district, there is trade flow into the Boston, New York and Youngstown districts by the following trade factors: P&C, Price Chopper and S.M. Flickinger.

From the Boston sales district, there is trade flow into the New York, Syracuse and Philadelphia sales districts by the following trade factors: Stop-N-Shop, First National, Springfield Sugar, Bozzuto's and Waldbaum's (Tr. 6446–48, 6560–72).

3. The Supply Forces

(a) *The Shipment Of Regular Coffee From Plant To Customer*

105. The Maxwell House Division ships ground coffee to all areas of the country from its plants located in Hoboken, New Jersey; Jacksonville, Florida; Houston, Texas; and [29] San Leandro, California. All of the Division's brands of regular coffee are in nationwide distribution (CX 1072D–G). Because these coffee plants ship the Division's products to almost anywhere in the country, its quality assurance department was formed to ensure that the products produced at each plant conform to uniform quality specifications (Tr. 5082–83).

106. No single plant has the exclusive responsibility for shipping the Division's regular coffee products to a specific area (Tr. 5132). There are a number of factors which determine which plant ships coffee to which area, one of the most important being which plant is the most efficient or least-cost producer (Tr. 5125). For example, the Jacksonville plant, because of efficiencies realized there, produces 50% of the Regular Maxwell House coffee distributed in the United States and 60% of all the regular coffee distributed by the Division (Tr. 5125).

107. Regular Maxwell House is produced at each of the four Maxwell House Division plants, none of which is the exclusive source of supply for any area of the country (Tr. 5124). All the Division's plants produce Yuban regular coffee, with the single exception of Yuban Electro-matic brand which is produced only at the San Leandro plant and distributed nationally from there (Tr. 5133).

108 Max-Pax is produced only at the Jacksonville plant and distributed nationally from there whereas Mellow-Roast is produced only at the Hoboken plant and distributed nationally from there (Tr. 5134–35).

109. The beans used in the production of Sanka and Brim are decaffeinated only at the Hoboken and Houston plants, but are processed into regular coffee at all four plants. There are no limitations on the areas to which a particular plant can ship Sanka or Brim (Tr. 5133).

110. There is a strong market in the United States for Kosher coffee products. The Division's Hoboken plant is not authorized to produce Kosher for Passover products because Mellow Roast, an extended coffee product manufactured at Hoboken, uses grain. Thus, no products from the Hoboken plant conform to the Kosher for Passover dietary requirements, and, during certain periods, the Hoboken plant does not ship Maxwell House Division brands across the river to the

New York City area, where there is a great demand for Kosher for Passover products. All of the Division's Kosher for Passover products are supplied to the New York City area from its other plants (Tr. 5128–30). [30]

111. Folger has three regular coffee plants, one in San Francisco, California, one in New Orleans, Louisiana, and one in Kansas City, Missouri (Tr. 3224). When Folger expanded into the east, it did not build any new production capacity. In fact, it had recently divested itself of its Houston plant in compliance with an FTC consent order. The New Orleans and Kansas City plants supplied the coffee for Folger's eastern expansion (Tr. 3223).

112. Folger's flaked coffee is manufactured only in the San Francisco plant and distributed nationally from there (Tr. 3227), and its High Point brand is manufactured only in the San Francisco plant and shipped to Portland, Oregon and St. Louis, Missouri (Tr. 3226).

113. During much of the 1970's, Standard Brands' Chase & Sanborn brand of coffee was in national distribution (CX 1072A–G). Since the early 1970's, Standard Brands has distributed Chase & Sanborn nationally from only one manufacturing plant in New Orleans, Louisiana (Tr. 10,585). Its other coffee roasting plants in San Francisco, California, Chicago, Illinois, and Hoboken, New Jersey were closed during the sixties and early 1970's (Tr. 10,585).

114. Hills Bros. has two coffee plants, one in San Francisco, California and the other in Edgewater, New Jersey (Tr. 2664–65). During the period 1970-1976, the San Francisco plant generally serviced an area west of a line extending diagonally from eastern Montana to the eastern-most point in Texas, while the Edgewater plant generally serviced the area east of that line. Specifically, the Edgewater plant serviced areas as far west as Oklahoma City, Chicago, most of North and South Dakota, and Des Moines, Iowa (RX 1086; Tr. 2666–68).

115. During an eight-month period from mid-1977 to early 1978, all of Hills Bros.' regular coffee distributed in the United States was being produced at the Hills Bros. Edgewater, New Jersey plant (RX 1276).

116. Regional producers also ship their coffee over great distances. Chock Full O'Nuts, which is produced and principally marketed in the New York City area, ships its products as far west as California (Tr. 10,299, 10,542). During the period 1971–1977, Savarin coffee, which was produced and principally marketed in the New York City area, was being distributed in the following Maxwell House Division sales districts: Jacksonville, Florida; Youngstown, Ohio; Portland, Oregon; and Denver, Colorado (CX 1072A–G; Tr. 10,542). The MJB brand, which was produced and principally marketed on the west coast, was [31] distributed during fiscal 1971–1977 as far east as Dal-

las, Cincinnati, Minneapolis and Jacksonville, Florida (CX's 437G, 1072A–G).

(b) *Coffee Producers' Areas Of Distribution*

117. Some regular coffee producers in business during the 1970's sold their product only in one Regular Maxwell House sales district. For example, the Victor, Autocrat and Maplewood brands, were sold only in Boston/Providence; Breakfast Cheer and Columbia were sold only in Pittsburgh; Wilkins appeared only in the Baltimore/Washington area; the Seven Thirty brand was sold only in Charlotte; and the Red Diamond, Royal Cup and Bailey's Supreme brands were sold in Atlanta, Birmingham and Montgomery (CX 132G–P; Tr. 4559).

118. As to other brands which were sold in more than one sales district, there were variations in the market shares of these brands from district to district (CX's 20Z–37; 132G–P).

4. Expert Analysis Of The Demand And Supply Forces

(a) *Dr. Elzinga*

119. Approximately 25% of regular coffee is shipped between 500 and 1000 miles from the plants where it is produced (RX 1227). During fiscal 1971–1977, about 40% of the Maxwell House Division's regular coffee brands were shipped more than 500 miles (RX 1225). The fact that one can ship coffee long distances at freight rates that are rather inconsequential in terms of overall cost of the product (Tr. 9432), the absence of legal barriers to the nationwide shipment of coffee, and evidence that the four Maxwell House Division plants, and plants of other producers, ship regular coffee nationwide, led Dr. Elzinga to conclude that the geographic market for regular coffee is probably nationwide (Tr. 9430–32, 9445–46).

120. Dr. Elzinga used the word "probably" because the purpose of his testimony was to challenge Dr. Mann's conclusion as to the relevant geographic market, not to determine how extensive it actually is. Dr. Elzinga's challenge was based on his application of the Elzinga-Hogarty test to determine whether [32] the Youngstown, Syracuse and Philadelphia sales districts or the combination of those sales districts qualified as relevant geographic markets for the sale of regular coffee (RX 1228; Tr. 9446, 11,987).

121. The Elzinga-Hogarty test for determining geographic markets was published in the *Antitrust Bulletin* in 1973. It was developed in conformity with the economic theory of geographic market delineation and was designed to be applicable in a scientific manner, *i.e.*, practically workable and capable of replication. Under this test, a particular area qualifies as a relevant geographic market if two condi-

tions are met: (1) very little of the total production in that area is exported; and (2) consumers in that area are consuming goods primarily produced there. If there are substantial exports by producers located in that area or significant imports into that locale, or both, then the area is drawn too narrowly to constitute a real world geographic market (Tr. 9420–21).

122. Dr. Elzinga's test has been used to determine the relevant geographic market for cement, bulk electric power, coal, beer, and crude oil (Tr. 9429). Dr. Douglas Greer,[9] in his testimony and in a textbook authored by him, describes the Elzinga-Hogarty test as one of the few constructive analytical procedures that has been advanced for determining relevant geographic markets (Tr. 11,595; *Industrial Organization and Public Policy,* at 162).

123. The Elzinga-Hogarty test embraces the two economic factors pertinent to the determination of a relevant geographic market. If transportation costs are so high relative to the value of the product that an area of the country is essentially sealed off from outside competitive pressures, that fact would be revealed by the absence of significant shipments to or from the area. In like fashion, the shipment data would reveal whether a legal barrier prevented commercial transactions from occurring between particular areas (Tr. 9424).

124. Each of the sales districts examined by Dr. Elzinga failed the Elzinga-Hogarty test by a considerable margin (Tr. 9455). In the Youngstown sales district, more than 80% of the ground coffee consumed there was imported from other areas (Tr. 9449). At least 85% of the coffee consumed in the Syracuse sales district was imported (Tr. 9451–52); and, in the combined [33] Syracuse, Youngstown and Philadelphia sales districts, about 75% of the coffee consumed in that area was imported (Tr. 9454–55) Thus, none of these areas qualify as a relevant geographic market under the Elzinga-Hogarty test (Tr. 9453).

125. Dr. Hilke, an FTC economist called by complaint counsel in rebuttal, presented a hypothetical challenging Dr. Elzinga's contention that the Elzinga-Hogarty test is conservative.[10] Although Dr. Elzinga conceded that Dr. Hilke's hypothetical is very provocative and clever (Tr. 11,999), he concluded, and I agree with him, that it has no relationship to shipment data in the coffee industry (Tr. 11,998).

126. The Elzinga-Hogarty test is an accepted method of presenting a numerical description of the Supreme Court's decision in *Tampa Electric, infra,* which placed great emphasis on shipping patterns in the determination of relevant geographic markets, and absent con-

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[9] A professor of economics at San Jose State University who was called as a rebuttal expert by complaint counsel.

[10] That is, on the basis of shipments data, you might designate two areas as separate geographic market areas when in point of fact, if there was a slight price increase in one, it would elicit shipments from the other, which would show that the two areas in fact should have been construed as one geographic area (Tr. 11,998–99).

vincing countervailing arguments, I believe that it should be given primary consideration in deciding this issue. I now turn to the countervailing arguments presented by complaint counsel's experts.

(b) *Dr. Mann*

127. Dr. Mann relied on the following facts in arriving at his conclusion that the relevant geographic markets for regular coffee were no larger than a Maxwell House Division sales district:

(a) Statements in Maxwell House Division documents which recognize different levels of trade dealing between the sales districts (Tr. 3530–33). [34]

(b) The fact that the "economic" price and the "dead net" price of Regular Maxwell House, differ between sales districts and that they do not converge as one would expect them to do if the sales districts were not separate geographic markets (Tr. 3536–42).

(c) The appearance of different competing sellers in various sales districts (Tr. 3553).

(d) Restrictions on transshipment by the Maxwell House Division (Tr. 3554).

(e) Retail distribution patterns as revealed by the Lysacker study which indicate that 90% of regular coffee stays within the confines of a sales district (Tr. 3564–65).

(c) *Dr. Greer*

128. Another fact, product differentiation, was considered by Dr. Greer, for he believes that the scope of the geographic market can be limited by this phenomenon (Tr. 11,512). Thus, according to him, if one finds that a particular brand of coffee is the leading brand in a limited geographic area, one could conclude that this area constituted a relevant geographic market (Tr. 11,602).

5. Conclusion

129. After considering all of the expert testimony on this point, I have come to the conclusion that the Elzinga-Hogarty test describes more accurately than any other fact or set of facts relied upon by complaint counsel's expert witnesses the primary forces which determine the relevant geographic market for regular coffee.

130. The only fact relied upon by Drs. Mann and Hilke which even suggests that the market for regular coffee is regional is the claimed difference in the economic and dead net prices of Regular Maxwell House between sales districts, for one can expect a convergence of prices within a relevant geographic market. However, after analyzing the testimony of these [35] gentlemen, I have decided that Dr. Elzinga

is correct: price data is so complex and ambiguous[11] that it is of little practical utility in resolving the issue of relevant geographic market (Tr. 11,992).

131. The other facts relied upon by Dr. Mann are of no significance. The statements by Maxwell House Division employees and other industry members relied on by him reveal only that demand for coffee differs among sales districts; they indicate nothing about the supply side of the equation, the issue of most importance. The same is true with respect to retail distribution patterns. Even if the Lysacker study is valid,[12] it reveals only the pattern of shipments from warehouse to retail store. It does not tell me which roasters retailers can turn to for their supply of regular coffee. Furthermore, the pattern of distribution disclosed in the Lysacker study is changing. General Foods is unable, as a practical matter, to control trade flow and transshipment and more grocers are expanding their area of distribution across sales district boundaries. Finally, the fact that different sellers appear in different sales districts means only that they choose to restrict their area of distribution, not that they are limited to those areas by market forces.

132. Dr. Greer's injection of product differentiation as an additional factor leads to a rather bizarre result—each seller of a branded product would operate within a geographic [36] market defined by his area of distribution (Tr. 11,520). Whatever the merits of this approach may be when other issues are considered, antitrust analysis would be impossible if one accepted this theory. Furthermore, Dr. Greer agreed that the implication of this theory is that the geographic market for Regular Maxwell House is nationwide since it is sold nationwide (Tr. 11,521), a point which complaint counsel obviously do not want made.[13]

133. In conclusion, I accept the Elzinga-Hogarty test as a valid means of testing whether or not a given area is a relevant geographic market. The Youngstown, Syracuse and Philadelphia sales districts individually and in combination fail the test by considerable margins. For this reason, and for the reasons given in my conclusions of law, *infra*, I find that neither these sales districts, nor the other Maxwell

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[11] For example, price differences may be the result of different marketing mixes in use in different areas of the country or distribution costs (Tr. 9466–67). Furthermore, analyzing the price of Regular Maxwell House tells one nothing about the prevailing market price of the coffee sold by all producers and relying on the price of one brand of coffee might result in different geographic markets for each brand of coffee (Tr. 11,994). Finally, price data is subject to varying interpretations. CX 1380, which compares Regular Maxwell House's average annual prices in the Youngstown and Syracuse sales districts from fiscal 1971–1977 disproves, according to Dr. Hilke, a national market (Tr. 10,929–30). However, Dr. Elzinga pointed out that if one looks at the prices over the seven year period, they differed only by 1% (Tr. 11,990).

[12] General Foods argues that it is seriously flawed (RPF 4–107 to 4–110) but I need not decide this question because its conclusions are of no relevance in the circumstances of this case.

[13] Complaint counsel argue that Dr. Greer's statement can be "misconstrued" (CRF 3–1) but I believe that the implication of his theory is as he stated.

House Division sales districts (or any smaller geographic areas such as the Cleveland or Pittsburgh market areas) are relevant geographic markets for the sale of regular coffee.

134. Since complaint counsel allege that General Foods attempted to monopolize the sale of regular coffee only in certain sales districts, further analysis of their Section 5 claim is unnecessary, for General Food's market power or its sales below cost in individual sales districts are irrelevant in terms of their effect on competition in the actual relevant geographic market which is much more extensive than the sales districts. Nevertheless, the parties are entitled to findings on the other issues presented by complaint counsel for purposes of possible appeal, and I will discuss them at some length.

I. *The Alleged Attempt To Monopolize*

1. The Definition Of Price

(a) *Introduction*

135. Before discussing complaint counsel's claim that General Foods attempted to monopolize "the Eastern ground coffee markets" (CLA, p. 1) by engaging in price and non-price predation, one must decide what price one will use in analyzing that claim. [37]

136. The Maxwell House Division sells its regular coffee to wholesalers and retailers, but the price which these customers pay (and the revenues which General Foods receives) is not solely a function of its list prices, for price is also affected, if one does not view them as costs, by the allowances which General Foods offers to its customers in trade deals (non-performance and performance allowances) and to its customers' customers, the ultimate consumer, in the form of consumer promotions (RECUs and consumer coupons).

137. The definition of price may also be affected by the purpose for which it is used—that is, whether one is analyzing complaint counsel's attempt to monopolize or Robinson-Patman claims. The present discussion deals with the former claim. The Robinson-Patman price is discussed more fully in the section dealing with that statute.

(b) *"Economic" Price*

138. Dr. Mann testified that "economic price" equals average revenue received by the seller per unit, and that this price is calculated by deducting from net sales revenue "other forms of price reductions" (Tr. 3674).

139. In calculating price, economists do not treat costs, such as advertising, as reductions in revenue, and costs do not, therefore, affect that evaluation (Tr. 3687).

140. The parties agree that non-performance allowances are price

reductions and that they should be deducted from list price. The parties disagree on the proper treatment of the other promotional allowances which the Maxwell House Division offers to its customers and to the ultimate consumer. Complaint counsel argue that these allowances are price reductions whereas General Foods urges that they are costs and should not be deducted from list price.

141. Dr. Mann testified that the economic price for Regular Maxwell House equals net sales less promotions divided by volume. He included all trade and consumer promotions in his definition of promotions (Tr. 3676). Professor John Dearden, who computed the profitability of the Maxwell House Division's regular coffees agreed that promotions are price reductions, whether they are offered to the retailer or to the consumer (Tr. 66–67). [38]

142. Dr. Elzinga offered a definition of economic price which differs markedly from that proposed by complaint counsel's experts, for he would not treat as a price reduction any offer which is not unambiguously welcomed by a customer (Tr. 9462–63). Since some customers turn them down, Dr. Elzinga does not, therefore, view consumer coupons or performance-related offers as price reductions (Tr. 9464).

143. Dr. Greer was called in rebuttal by complaint counsel. He testified that Dr. Elzinga's treatment of consumer coupons and performance-related offers is inconsistent with the law of symmetry, that is, that a price reduction to the buyer must result in a reduction in the price received by the seller (Tr. 11,338, 11,344–46).

144. I see no reason why Dr. Mann's definition of economic price as revenue received should not be accepted for Section 5 purposes. Given this, I cannot agree with Dr. Elzinga's analysis, for his test proposes that the definition of price depends on the type of promotional allowance which is offered, and to whom it is offered, even though, from General Foods' point of view, its revenue is reduced by the same amount whether a 10% promotional or buying allowance is given to a retailer, or a ten cent coupon is redeemed by a consumer.

145. I therefore agree with Dr. Greer that coupons given to consumers by the Maxwell House Division, either directly or through retailers, reduce the consumer's (but not the retailer's)[14] purchase price (Tr. 11,399) and that, to the extent they are redeemed, they reduce General Foods' revenue (*i.e.*, Dr. Mann's economic price) by a corresponding amount. The same logic also applies to performance offers which are accepted by the trade, for to the extent they are accepted, they reduce the Division's revenue.

146. In conclusion, I believe, with some reservations, that the Maxwell House Division's revenue, as reduced by its non-performance and

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[14] *See* my discussion, *infra*, of the definition of Robinson-Patman price.

performance offers and its consumer coupons, is a price which may be used to analyze the attempt to monopolize charge.

147. The reservations I have with Dr. Mann's and Dr. Greer's definition of price is caused by the fact that the [39] definition assumes that retailers always accept promotional offers and that consumers redeem every coupon. This is demonstrably untrue. While there is a high rate of acceptance of the Division's performance offers, some are not accepted (Tr. 2391). The rate of coupon redemption is much lower. Complaint counsel's accounting expert, Mr. Rowe, estimated that it is 33% (Tr. 2392). Thus, one cannot assume that all coffee sold under a particular mix of promotional offers is sold at the same economic price. For example, if the Maxwell House Division sells one-pound cans of coffee for 90 cents and offers a 10 cent coupon to consumers, General Foods' revenue, and the "economic price" of that coffee is 80 cents only to the extent that the 10 cent coupon is redeemed. If only 10% of coupons are redeemed, then only one out of ten cans of coffee are sold at the 80 cent economic price. The other nine are sold at a higher price.[15]

(c) *"Dead Net" Price*

148. While complaint counsel state that: "Economic price provides a more accurate measurement than dead net price of the prices that respondent actually received," some of their price analyses, including their Robinson-Patman analysis, use the latter price, defined by them as "total Maxwell House sales revenue, net of trade deals (buying allowances, performance allowances, and retailer coupons), divided by sales volume" (CPF 12-1; CLA, p. 87, n. 312).

2. The Maxwell House Division's Response To Folger's Eastern Expansion

(a) *Cleveland*

149. At the time of Folger's expansion into the HFNI, Mr. Laster was president of the Maxwell House Division. [40] Although he was charged with developing a plan of defense, it had not been developed when, in October 1971, Folger entered Cleveland, and the Division's response was modest (Tr. 2743, 6952-53).

150. Regular Maxwell House's share in Cleveland at the time of Folger's entry was 43.5%; Hills had a 22.4% share; Chase & Sanborn

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[15] The somewhat theoretical nature of "economic price" was recognized by Dr. Mann when he was asked if it was "the actual price paid by any customer of General Foods." He replied: "It is what the average customer pays. If you pick one single customer out in the real world this may not be the price paid, but it is what the average customer pays" (Tr. 3676). This colloquy also reveals Dr. Mann's difficulty in keeping his definition of price consistent, for his definition of price as "revenue received" is not necessarily equal to the price which the Division's customers pay (*See* Finding 448, n. 41).

had a 9.8%; and COB[16] share was 17.1%. Because of the trade's emphasis on "hot features," share levels had fluctuated significantly: Regular Maxwell House from 33% to 52%, Hills from 14% to 37%, and Chase from 6% to 15% (CX 85B).

151. Mr. Laster recalled that Folger's came in "with a very good product"—"they believe in quality as we do," a very strong market plan using proven advertising at high levels, consumer promotions at "significant levels" and "trade deals that were significantly higher than the deals that were in the Cleveland area prior to their coming" (Tr. 6958). Folger's consumer promotions also included delivery of free coffee to homes as a sampling device (Tr. 6958). General Foods perceived the Procter & Gamble introduction as "higher than a normal introduction would warrant" (Tr. 7040).

152. On the other hand, Mr. Hunter, Folger's general manager at the time of the Cleveland test, believed that its planned spending was similar to that of recent Hills Bros. and Taster's Choice introductions (Tr. 2734–38). Folger's initial share objective in Cleveland—20%—and its 22-month payout[17] objective were considered to be "about on the line" and "modest" by him (Tr. 2711, 2713, 2738, 3022).

153. On October 8, 1971, the Maxwell House Division computed Folger's net cost to the trade (not counting RECU's) as lower than Regular Maxwell House's (CX 85E), and another Division memorandum reported that Folger's introductory rates on two pound and three pound were "considerably higher than the traditional rates for Cleveland" and, in fact, were 100% greater than the traditional Cleveland trade rates (CX 694A).

154. In November 1971, Mr. Laster and Mr. Nelson, the Division's national sales manager, made a personal inspection of the Cleveland area. Mr. Laster concluded from the inspection that "there was no question in my mind that Folger's had established itself in the marketplace at an extremely high level and that their brand in a very short period of time had become [41] extremely successful" (Tr. 6961). Mr. Nelson reported in a November 16, 1971 memorandum that Folger's introduction into Cleveland had been "disturbingly successful" and that Folger's had obtained an "outstanding coffee section" in many stores (CX 122). The same point was reported by Mr. Tower, the Division's marketing manager in a January 3, 1972 memorandum to Mr. Tanck, then ground category manager of the Division. He reported that Folger had attained excellent distribution of its coffee, and had an excellent retail shelf position, in some cases better than Regular Maxwell House. Folger's shelf prices and feature prices were equal to Regular Maxwell House's, it was experiencing strong trial by con-

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[16] "Chain's own brand," or private label coffee.

[17] "Payout" is the time needed to recoup introductory investment (Tr. 2713).

sumers, was employing an effective advertising copy and had an excellent package and product (CX 692A).

155. Folger's perceived initial success in Cleveland convinced Mr. Laster that it would soon be a national brand and that if Regular Maxwell House wanted to maintain its share position it had to adopt a different posture than that adopted during Folger's first three months in Cleveland (Tr. 6967). Mr. Laster felt it "was important not to have [Folger] expand rapidly to the rest of the East before we have thoroughly learned from the Cleveland test market. . . ." (Tr. 6979), and he felt that it was important to defend so that Procter & Gamble would realize that General Foods "would not be the Scott Paper of the coffee industry" (Tr. 6978).[18]

156. Consequently, on March 23, 1972, Mr. Laster presented a recommendation to General Foods' management on its response to Folger's national expansion (CX 130A–I; Tr. 6967).

157. CX 130A is a cover memorandum dated March 23, 1972, from Mr. Laster to Mr. R. Bohm. At the time of this memorandum, Mr. Bohm was executive vice-president of General Foods with line responsibilities for the Maxwell House Division (Tr. 6950–51, 6966–67, 7029). Mr. Laster's memorandum states:

> Attached you will find a deck showing assumptions, strategies and calculations for the various Folger defense options. [42] Basically, this covers some of the material discussed at the recent Operating Committee meeting. Please let us know if we can elaborate on the attached material (CX 130A).

The attached "deck," CX 130B–L, is entitled "Folger's Defense Options" and is dated March 16, 1972 (CX 130B).

158. The "Operating Committee" was a senior management group in General Foods that was used as an "advisory group" to Mr. Bohm when he had to make significant decisions (Tr. 6967, 7029). Mr. Bohm initiated the formation of the Operating Committee, which was made up of many of the high-ranking executives of General Foods, including some division presidents and corporate staff personnel. Mr. Bohm was chairman of the Operating Committee at the time of CX 130A-I (Tr. 4545–46).

159. CX 130B–I is an analysis presented to General Foods' corporate management which shows the financial impact of following the options of "not defending," "defending now," or "defending later" (Tr. 6963–64).

160. On the basis of CX 130B–I, Mr. Laster recommended to the

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[18] A reference to the experience of the Scott Paper Company when Procter & Gamble expanded into its market:

> You look at Scott Paper or a couple of other companies that were fairly passive in their reaction, they literally almost went down the tubes (Trone, Tr. 1468).

Operating Committee that General Foods "defend . . . from the very first day that P&G moves into new markets. . . ." (Tr. 6964). The "defend now" strategy described in CX 130A-I was adopted at the Operating Committee meeting (Tr. 6994, 7031).

161. Under the "defend now" strategy, the study did not project losses on a national basis but predicted a loss of $4 million in the HFNI sales districts in year one. A positive profit before taxes of $6 million was projected for year two and $7.5 million was expected in year three (CX 130F).

162. In Mr. Bohm's judgment, the best strategy for Maxwell House to follow in response to Folger's expansion was the "defend now" strategy, and the figures set forth on CX 130F were one of the reasons for his judgment (Tr. 4547). The maintenance of Maxwell House's level of profitability in the high franchise non-infringement sales districts was a factor that influenced Mr. Bohm in his conclusion (Tr. 4547–48). Mr. Laster also testified that an objective of the Folger defense was to maintain the long term profitability of regular Maxwell House (Tr. 7011). He explained:

> [M]axwell House coffee is a very important division to General Foods and as such, the profitability of our brands is highly significant to the corporation (Tr. 7012). [43]

163. The Maxwell House Division expected its "defend now" strategy to increase future division-wide profits of the Maxwell House Division by several millions of dollars as compared to the profits that would be made if the other proposed plans were followed. For fiscal years 1973 through 1977, the "defend now" strategy would result in $16.2 million dollars more profit than the "no defense" strategy, and $23.1 million more than the "defend later" strategy (CX 130I). By fiscal 1977, the Division would earn $77.2 million under the "defend now" strategy, as contrasted with $62.6 million and $66.5 million respectively under the "no defense" and "defend later" strategies (CX 130G).

164. While the "defend now" strategy outlined in CX 130 shows a higher national profitability than either the "no defense" or "defend later" strategies, the projected profits resulting from the "defend now" strategy were lower than Regular Maxwell House's "base" profits, or profits prior to the Procter & Gamble expansion. Prior to Folger's expansion, Regular Maxwell House's national "base" profit was $19.8 million. This base profit would be expected to decline to $8 million in the third year of a "no defense" strategy, to rise to $11 million in the third year of a "defend later" strategy and to equal $15.5 million in the third year of "defend now" strategy (CX 130F).

165. The Maxwell House Division also expected its response to

Folger's entry to increase Regular Maxwell House's market shares and limit Folger's market shares in the HFNI sales districts:

Regular Maxwell House and Folger's will be able to achieve the following on-going HFNI shares under the alternative defense options:

Share	Base Plan	No Defense	Defend Later	Defend Now
RMH	39%	30%	39%	42%
Folger's	—	20%	20%	10%

(CX 130C).

166. Although the plan described in CX 130 was accepted by management, plans such as these were revised based on new [44] information and experience. For example, as a result of an ongoing debate within General Foods on whether it was necessary to match Folger's marketing levels, when Folger's expanded into Syracuse General Foods abandoned the strategy of attempting to meet Folger's trade deal rates in favor of an approach that would result in less trade promotion expenditures for Regular Maxwell House (Tr. 6994).

167. A later document prepared between mid-1974 and mid-1975 attempted to quantify the financial impact of the "defense" versus "no defense" options (Tr. 8231-32).

168. Under the defense option, Maxwell House anticipated losing $100,000 on a national basis in year one (RX 518E; Tr. 8245, 8866), but its profit would be $43 million by year ten (RX 518E; Tr. 8867).

169. Under the defense option between year one and year ten, Maxwell House's trade deal rate per unit would decrease by about 25%, its consumer promotion rate per unit would decrease by over 50%, and its advertising rate per unit would decrease by over 50%. Its total marketing expenditure rate per unit would decrease by almost one third (RX 518E; Tr. 8867-69).

170. RX 518A also describes the financial and market share impact of defending versus not defending against the Folger introduction. Under the defense option, Maxwell House's market share would increase by 5% (RX 518A-B; Tr. 8238, 8865). Under the "no defense" option, Folger would reach a 25% share and Maxwell House would lose market share in proportion to its share at the time of entry (RX 518A-B; Tr. 8238, 8859-60). Under the defense option, Maxwell House's volume would increase from its pre-entry levels by 530,000 units in year one, by 505,000 units in year two, and by 480,000 units on an on-going basis (RX 518A; Tr. 8239, 8865). Each unit represents twelve pounds of coffee (Tr. 8239).

171. RX 518A indicates that a decision to defend against Folger's entry, as opposed to not defending, would generate a profit for General Foods of 34% in terms of incremental ROFE before taxes, which was "favorable when compared to RMH's [then] present ROFE of

22%" (RX 518A; Tr. 8235). "ROFE" refers to return on funds employed (Tr. 8235).

172. At the beginning of the March quarter of fiscal 1972, the Division concluded that it had to match Folger's marketing levels in Cleveland (Tr. 696). This matching strategy was adopted because a disparity in trade deals would put Regular Maxwell House "in a very significant disadvantage" (Tr. 6977). Disparity in trade deal rates could result in a disparity in [45] shelf price so that Regular Maxwell House would be selling at a premium versus Folger's. This would result in Folger's being featured more frequently and aggressively by the trade, and would increase the trade's purchases of the Folger brand because it would be a more profitable item (Tr. 6978).

173. General Foods imposed two restrictions on the Division's ability to respond to Procter & Gamble. First, all sales of Regular Maxwell House during a four-to-six week trade promotion period had to exceed its reasonably anticipated variable costs (as defined by General Foods) (Tr. 7051–55, 9073–74). Second, the Division was not to "aggress," which meant that Regular Maxwell House could not lead any element of the marketing mix and could not have higher levels of consumer promotions than Procter & Gamble (Tr. 6973).

174. Documents written by Division personnel during the Cleveland test reveal that the Division was attempting to meet Folger's trade dealing, and, hopefully, to de-escalate it (CX's 14P, 110A, 633J, 643H, 644W, 649D, 651E).

(b) *Defense Expenditures In Cleveland*

175. In January 1972, the Maxwell House Division launched what Mr. Hunter termed a "heavy counter-attack" (CX 494). The counterattack included the use of a $.50 mailed coupon, as opposed to Folger's introductory $.35 coupon and a planned follow-up coupon of $.10 (CX 494; Tr. 2086, 2745). The Division also used in-pack coupons of 10 cents, 29 cents and 39 cents on one, two and three pound coffees, as opposed to Folger's 25 cent and 35 cent coupons on two and three pound coffee (CX 494; Tr. 2745–46). Third, the Division offered a trade allowance on the three pound size of $2.50 a case, a $.50 retailer coupon and a $.50 display allowance. According to Mr. Hunter, the $2.50 trade allowance was substantially higher than the allowance previously offered in the market (CX 494; Tr. 2745–47).

176. The Maxwell House Division's response must, however, be considered in light of Folger's distribution of free coffee to Cleveland consumers (Tr. 6291). Furthermore, Folger's advertising expenditures in its first year in Cleveland were $596,000, while Regular Maxwell House's advertising expenditures during the same period were actual-

ly less ($540,000) (CX's 553A, 1389). Folger also exceeded Regular Maxwell House's per case advertising rate (CX's 553A, 954). [46]

177. Complaint counsel argue that these and other comparisons are meaningless and they offer alternative methods of assessing the Division's response which take into account, they claim, "advertising weight" and the number of times each firm used coupons (CRF 1-78 to 1-80).

178. While it may be true that "For the entire year [in Cleveland] Maxwell House had 53% more GRP's than Folger" (CX 450K) (and even this is disputed by General Foods (RPF 6-86)), complaint counsel do not explain the significance of this fact. With respect to the number of times a coupon is used, one would expect the company with the larger market share to spend more money because it has greater volume than the new entrant. In fact, complaint counsel argue that the reasoning behind the Division's western retaliation (*infra*):

> [W]as clear. General Foods' response to Folger's introduction in Cleveland had cost it a great deal of money. The Western Retaliation was devised so that General Foods could go into highly profitable Folger markets and equalize those financial expenditures (CPF 5-11).

179. In another proposed finding (CPF 5-5(a)), complaint counsel argue that the purpose of the retaliation was "to force Folger to increase its spending." Mr. Trone explained the reasoning behind the retaliation:

> A. Well, as Folger's came into the east and came into our high volume, high profit centers, the idea was to go into the west . . . into one of their markets that they had very high share levels in and were very dependent on profits.
>
> Q. How would this . . . strategy help to achieve the objective of increasing Folger's payback?
>
> A. Because our volume base was so small and their volume base was so high in those areas; in order for them to meet our deal rate structures, they would have to spend an awful lot of money. . . . (Tr. 1399-1400). [47]

180. It seems inconsistent to me to argue that the Division's defense expenditures in response to Folger's blitz in the HFNI, however measured, were inordinate while arguing that Folger's expenditures in the West were "forced" by the Division's retaliation. Thus, while there may be several valid ways to estimate the intensity of the Division's response, I believe that the one proposed by General Foods offers as much insight as do complaint counsel's comparisons. Using these, even as expanded by complaint counsel (CRF 1-81), one sees that while the Division spent more than Folger for consumer promotion and advertising after the introductory period, it was not, with one exception (1-3/72 in Cleveland) by very much.

(c) *Pittsburgh*

181. At the time of Folger's expansion into Pittsburgh, Regular Maxwell House's share was 45%, the Breakfast Cheer brand had an 18% share and Hills had a 9% share. Breakfast Cheer, according to a Maxwell House Division memorandum, enjoyed "strong consumer/trade acceptance" in Pittsburgh and was expected to "vigorously defend" (CX 94B).

182. Folger's formal introduction into Pittsburgh in March 1973 consisted of case rates 40¢ higher than Regular Maxwell House's, 40-day credit terms, and distribution of one pound free samples of Folger's coffee in the Johnstown/Altoona area and six ounce free samples in the metropolitan Pittsburgh area (CX 57B). Under 40-day credit terms, the grocery trade received a 2% prompt payment discount if they paid Folger's within 40 days. The prevailing prompt payment terms in Pittsburgh were 2% - 10 days, which offered a 2% discount only up until the 10th day (Tr. 8580). Following its initial offerings, Folger then escalated its trade deal rates to 40 to 50% higher than prevailing rates (Tr. 6981).

183. Due to the heavy cost of distributing free coffee to consumers, General Foods did not match Folger's free coffee program. Instead, General Foods responded to the Folger's six ounce free sample with a 25¢ DMCU and to the one pound free sample with a 39¢ DMCU (CX 169A). General Foods did not respond to Folger's more attractive payment terms, nor did it respond to Folger's increased introductory trade rates (CX 169A). As in Cleveland, the objectives of General Foods in Pittsburgh as transmitted to the Maxwell House Division's national sales manager were to maintain Regular Maxwell House's share there (Tr. 5772). Regular Maxwell House was allowed to meet but not [48] beat Folger's trade rates, with the overriding restriction that it was not to be sold below cost (as defined by General Foods) (Tr. 5774, 5785; *see also* CX's 57C, 150C, 735A).

(d) *Philadelphia*

184. Procter & Gamble introduced Folger's into Philadelphia in February 1973. Procter & Gamble recognized that expansion into Philadelphia was a "risky venture" because the grocery trade was selling coffee at five to twelve cents a pound below its "dead net cost" (CX 522; Tr. 3071–73). "Dead net cost," as used in this exhibit, refers to list price less trade deals only and does not take RECU's into account (Tr. 3073). It was anticipated that the grocery trade would, therefore, refuse to buy Folger's, "simply saying we don't want another brand of coffee to help us lose money" (CX 522).

185. Procter & Gamble's introduction into Philadelphia used strong

trade promotions and strong advertising and consumer promotions, including distribution of free coffee to 80% of the households in the area (Tr. 6980). As in Pittsburgh, Folger's trade rates were 40 to 50% higher than the previously prevailing rates (Tr. 6981).

(e) *Defense Expenditures In Pittsburgh And Philadelphia*

186. According to Mr. Hunter, after Folger's entry into Pittsburgh and Philadelphia, the Maxwell House Division employed a series of repetitive coupons, including several direct mail coupons, that far exceeded the amount of couponing used by Folger (Tr. 2813).

187. During the first year of Folger's entry into Pittsburgh and Philadelphia, General Foods, according to complaint counsel, continued to have a strategy of advertising more heavily than Folger (CX's 462P, Q, W, 480D).

188. General Foods responds that in Pittsburgh from April-September 1973, Procter & Gamble outspent Regular Maxwell House on consumer promotions ($1,027,000 vs. $532,800) and that during the first year of its expansion, Procter & Gamble's expenditures on consumer promotions were $1,131,000 as compared to Regular Maxwell House's $665,000 (CX's 553E, 956, 1389). [**49**]

189. General Foods also points out that Folger exceeded Regular Maxwell House's consumer promotion expenditures on a per-case basis in the April-June and July-September 1973 periods (CX 57B) and emphasize that Folger, unlike Regular Maxwell House, also had an extensive free coffee promotion in Pittsburgh.

190. As to advertising, Folger outspent Regular Maxwell House (CX's 449Z–5,450Z–6). Furthermore, Folger's trade rates in Pittsburgh and Philadelphia were in many instances higher than Regular Maxwell House's (Tr. 2847, 2878).[19]

(f) *Syracuse*

191. Prior to Folger's expansion into the Syracuse/Buffalo area, Regular Maxwell House's share there was 41.5%. Other competitors in that area included Hills, with a share of 11.3% and Chase & Sanborn with a share of 13.7% (RX 1114A).

192. Procter & Gamble introduced Folger in Syracuse in October 1974 with trade deal case rates about four to five times higher than the historic rates and substantially greater than Regular Maxwell House (Tr. 5946, 6199). Folger did not offer RECU's in Syracuse but instead focused on higher trade deal allowances that the grocery trade viewed as more attractive than RECU's (Tr. 11,872).

193. General Foods did not match Procter & Gamble's trade deals,

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[19] This is because Folger began to meet the trade rates of the so-called "secondary brands" in these cities, and these brands generally offered better trade deals than the leader (Tr. 2844, 2846, 3051).

but went significantly "below them," meaning that the value of Regular Maxwell House's trade deals were lower. According to Mr. Laster, there was a "great debate" in the Division as to whether it was important to match Folger's trade deals during the introductory period, or whether the limited marketing funds available could be better spent on advertising and consumer promotions (Tr. 6991).

194. The Division responded to Folger's trade deals with trade deals of lesser value plus RECU's. This strategy was not regarded by the Maxwell House Division as a true match of Folger's trade deals and caused Regular Maxwell House to lose significant share in the Syracuse area (Tr. 6992). **[50]**

195. Folger's higher trade deals resulted in lower everyday retail shelf prices for Folger (Tr. 6105). Since Regular Maxwell House's retail shelf price was higher than Folger's, and because of the frequency of coffee purchases, this everyday shelf price disadvantage had a negative effect on Regular Maxwell House's business (Tr. 6105). Under the "rate-RECU" program employed by General Foods, Regular Maxwell House's consumer dead net was competitive with Folger's everyday shelf price only one week of a four- to six-week trade promotion period, provided that the grocery participated in the RECU offer and the consumers clipped the RECU from the newspaper and presented it for redemption (Tr. 5933–35).

196. Share data for Folger's third month in the Syracuse/Buffalo area show the effect on Regular Maxwell House of its strategy. In its third month, Folger's attained a share of 33.7%, while Regular Maxwell House's share declined from 41.5% to 36.7% (RX 1114B).

197. The refusal to match Folger's levels of dealing activity continued to cause erosion of Regular Maxwell House's share through the first half of 1975. A May 9, 1975 Maxwell House Division memorandum reported that Regular Maxwell House's share had reached all time lows due to poor feature activity and shelf price disparities:

> RMH's share dropped 17.3 points to 30.3%, our lowest share to date. Folger's gained 6.1 points to 20.5% and C&S gained 9.0 points to 17.8%. Regular Maxwell House's decline can be attributed primarily to poor feature activity and widespread shelf disparities in Buffalo (CX 751A).

198. Regular Maxwell House, according to an August 7, 1975 memorandum, reached another record low share in June 1975 while Folger's attained an all time high share of almost 27%:

> RMH dropped 7.2 points to 30.1%, its lowest share to date and significantly below share objective. Conversely, Folger's gained 7.2 points for a new high of 26.9%. RMH's decline can be attributed, in part, to feature activity which while greater than Folger's

. . . is [51] consistent with the share obtained. In addition, shelf pricing disparity continues to plague the Brand (CX 752A).

199. Due to this erosion of Regular Maxwell House's business, Mr. Einloth, in a July 10, 1975 memorandum, recommended that Regular Maxwell House convert to trade deal rates equal to Folger's levels, and eliminate RECU offers (CX 710A). In July, the decision was made to terminate the rate and RECU strategy and to meet Folger's trade deal rates head on, "dollar for dollar" (CX 715A).

(g) *Defense Expenditures In Syracuse*

200. Complaint counsel claim that General Foods planned to employ a consumer promotion and advertising plan stronger than Folger's in Syracuse (CX 710D), that Maxwell House increased some trade deals after the announcement of Folger's introduction into Syracuse (CX 547A, C), and that, according to its advertising agency, General Foods out-advertised Folger in Syracuse (CX 462Z–12).

201. However, during the first three quarters of its expansion, $1,198,000 was expended on Folger's consumer promotions by Procter & Gamble as compared to $769,000 on Regular Maxwell House for the same period (CX's 553G, H, 957). During the first year, Procter & Gamble spent $1,257,000 on consumer promotions as compared to $969,000 for Regular Maxwell House (CX's 553G, H, 1389). Procter & Gamble spent $1,380,000 to advertise Folger's during the first three quarters, while Regular Maxwell House's advertising expenditures during the same period were $720,000 (CX's 553G, H, 957). On a rate per case basis, Folger's also outspent Regular Maxwell House on consumer promotion and advertising in Syracuse (CX's 553G, H, 957).

(h) *Documents Discussing The Maxwell House Division's Defense Efforts*

(1) Introduction

202. Complaint counsel rely extensively on contemporaneous statements by Regular Maxwell Division employees or agents which they say evidence General Foods' predatory intent (CPF's 3–81 to 3–184). There is no doubt that documents such as CX 130A–I and RX 518A–E establish what Division policy was at the time they were written. However, General Foods, citing statements [52] which I made when some documents were offered in evidence, warns that unless the author is known or unless complaint counsel establish that a proposal was relied upon, little weight should be given to statements made in the documents. General Foods also argues that inferences should not be drawn unless they are clearly justifiable (RPF 2–11 to 2–24).

203. All of this is sensible, but the fact remains that General Foods

also relies on statements in many of the documents offered in evidence by complaint counsel, a recognition, I believe, that the documents, if analyzed carefully in light of the circumstances surrounding their production, offer some insight into its intent when it responded to Folger's eastern market thrust.

(2) Intent To Maintain Profitability And Market Share

204. CX 130A–I and RX 518A–E, discussed above, reveal that one goal of the Maxwell House Division's response to Folger's eastern thrust, using the "defend now" strategy, was to maintain the Division's profitability and market share, and perhaps even increase it even though that strategy might result in an initial loss.

205. Other documents indicate that this strategy was considered and discussed throughout Folger's eastern expansion. A contingency plan dated June 9, 1976, states that:

> RMH is clearly in a better franchise, volume and financial position *by defending* when Folger enters the marketplace (CX 640M) (emphasis in original).

206. A September 13, 1972, memorandum from Mr. Tower to Mr. Laster (CX 633A) attached a contingency plan which listed as objectives:

> Provide a sound platform for restoring long-term profitability to RMH.
>
> Aggressively defend the HFNI against Folger's introduction and build share by 10+%. [53]
>
> Prevent Folger from exceeding a Year I 13% SOM in HFNI (CX 633F).

Mr. Einloth also wrote and confirmed that the objective of the defenses in Cleveland, Pittsburgh, and Philadelphia were to:

> Prevent Folger from exceeding a 13% share of market in non-infringement areas while building the RMH business by at least 10%.
>
> * * * * * * *
>
> Provide a strong platform for restoring long-term profitability to RMH (CX 725A; Tr. 1581).

207. A plan was developed by the Boston Consulting Group (CX 724A–G) to determine "What are the appropriate competitive and corporate goals for the MHD relative to the Folger Company" and "How can Folger's geographical expansion be halted or extremely constrained and at what cost to GF?" (CX's 724A, 725A). Complaint counsel argue that this document unmistakably indicates predatory

intent, yet the plan, although endorsed by Mr. Einloth, was never implemented (Tr. 1622).

208. Contingency and defense plans written between 1975 and 1977 reveal the authors' hopes that by defending, the Division could maintain profitability and build Regular Maxwell House's share from 5-10% (CX's 640J, 709G, H, 710A, D), and other documents written between 1971 and 1977 contain similar hopes (CX's 87A, C, 659D).

(3) Intent To Delay Further Expansion By Folger

209. Both Mr. Laster and Mr. Bohm testified that one of General Foods' defense objectives was to delay Folger's expansion into the eastern markets (Tr. 4537, 6984), and Maxwell House Division documents confirm that this was one of its goals (CX's 14C, F, 15E, 73H, 74E, 76C, 80F, 150B, 168A). Statements in other documents suggest that delaying Folger's expansion would maintain profits in the eastern sales districts:

> [t]he value of delaying [Folger's] expansion into the HFNI by two years [54] almost pays for our efforts (CX 724A; *see also* CX15W, 74Z-1, 80F, 82C, 88D, 19Z-44).

210. Some documents even reveal hopes by the authors that a vigorous defense would discourage further Folger's eastern expansion. While recognizing that "finite predictions are obviously impossible," Mr. Einloth, in a confidential memorandum stated that:

> If ground Folger were to match our spending levels, they would be placed in an LBT position of $12-15 [million] annually without any additional expansion. Expanding into the HFNI would increase that to $25-35 [million] (CX 724E; *see also* CX's 14C, 86M, 163A).

(4) Intent To Increase Payback

211. The fiscal 1973 marketing plan stated that one objective for Maxwell House was to "[i]ncrease Folger's payback" (CX 14C) and Mr. Einloth confirmed that this was a Maxwell House objective (Tr. 1549-50). The phrase "increase Folger's payback" meant that General Foods wanted to lengthen the time it would take Folger to break even after having entered a given market (Tr. 1608).

212. Another document indicates that Mr. Tower wanted to:

> develop plans that will prove to Procter that entry into our high-franchise markets will be expensive for them (CX 121B; *see also* CX's 74E, 77B, 87A, 133).

(5) The Statements In Perspective

213. The statements discussed just above must be considered in light of actual developments. Thus, the ambitious projection [55] that Regular Maxwell House could defend against Folger and increase its share in the HFNI was rejected by General Foods' management. Mr. Einloth testified that:

> We chose [the goal of preventing Folger's from exceeding] 13 per cent. Because if everything else held constant, they got 13 in the HFNI and we built by 10, we would retain national share leadership by about one-tenth of one percentage point. That was my objective as far as I was concerned—I had to convince a lot of people that that was important. I couldn't convince them to defend, let alone maintain, national share leadership. That is how I arrived at the 13.
>
> * * * * * * *
>
> MR. SPIEGEL: Did I understand you to say that you had to convince certain people at General Foods about these objectives?
>
> A. Damn right I did.
>
> Q. Who were the people that you had to convince?
>
> A. Tower, Laster, primarily those two.
>
> Q. Did you convince them?
>
> A. No.
>
> Q. You didn't convince them?
>
> A. Absolutely not. You know what General Foods' share of market is today?
>
> Q. I am talking about at this point in time.
>
> A. If I convinced them of national share leadership? Absolutely not. I did not (Tr. 1573–75). [56]

214. Mr. Einloth felt that maintaining national leadership was "absolutely vital," but this was an objective which he was not able to persuade management to adopt (Tr. 1613–15). The "real question" for management at the time of Procter & Gamble's expansion was whether funds should be spent for defending at all (Tr. 1615). According to him, it was a "constant battle" to sell management on the recommendation of the product group that leadership should be maintained. Eventually, the leadership issue "dropped out" (Tr. 1616).

215. Furthermore, despite the widespread belief among Maxwell House Division personnel that an immediate response to Folger's entry into the test markets was essential, an effective response in Syracuse was not attempted until Folger's success was almost assured (Findings 191–99), an indication that management was still reluctant to commit itself to an all-out defense.

(i) *The Reasonableness Of The Maxwell House Division's Defense Efforts*

216. After considering the defense mounted by the Maxwell House Division in Cleveland, Pittsburgh, Philadelphia, and Syracuse, the

documents describing those efforts, and Procter & Gamble's prior success in marketing new products, I find that the Division's response to Folger's entry was not "inordinate" as claimed by complaint counsel.[20]

217. Complaint counsel view the Division's response as "inordinate" because new entrants must use high promotion and advertising levels. They claim that Folger's entry spending plans were reasonable in view of that requirement. It is true that when introducing a product in a new geographic area, an entrant must employ higher levels of advertising and consumer promotion than the already-established brands to convince consumers to try the new product; and higher levels of trade promotion are also needed to convince retailers to stock and market the product (Tr. 2070–72, 2091–93, 2722–23, 2726, 2731–32). It does not follow, however, that the Division's decision [57] to meet Folger's expenditures in some areas was "inordinate," for Folger was not the typical new entrant.

218. From July 1, 1970 through June 30, 1971, the period immediately prior to the start of Folger's expansion into the HFNI, Procter & Gamble's worldwide sales were $3.2 billion, with net earnings of $238 million (CX 642F). In fiscal 1972, General Foods' worldwide sales were $2.5 billion, with net earnings of $113 million (CX 438F). At the time of its expansion of Folger's, Procter & Gamble marketed detergent products, food products, paper products and toilet goods under the following brand names: Tide, Cheer, Ivory, Joy, Safeguard, Comet, Cascade, Mr. Clean, Spic & Span, Crisco, Duncan Hines, Jiff, Pringle's, Charmin, Puffs, Bounty, Pampers, Crest, Gleem, Head & Shoulders and Prell (CX 642G).

219. Gordon Wade, who was employed by Procter & Gamble for nine years in various product management positions and was qualified as an expert in the sale of food and grocery products, testified that Procter & Gamble is the "best marketer of packaged goods in the world" (Tr. 4607). Although there have been some failures, Procter & Gamble has enjoyed great success in entering various consumer goods categories and attaining a leadership position while relegating prior market leaders to number two positions (Tr. 4607–11).

220. Mr. Wade's opinion is shared by the grocery trade. Mr. Engel regards Procter & Gamble as the "best packaged goods marketer in the United States" and testified that there was no way General Foods could keep Procter & Gamble's Folger's brand out of Cleveland or out of any other area Procter & Gamble desired to enter (Tr. 1702–05).

221. The management of General Foods also had great respect for Procter & Gamble (Tr. 4509). According to Mr. Laster, the president

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[20] I discuss *infra* complaint counsel's allegations that the Division's below cost sales, its use of Horizon, its western retaliation and its "Cora" campaign were illegal.

of the Maxwell House Division, "everything we knew about Procter & Gamble, everything we knew about Folger's, would lead us to believe that we were up against a very strong and very formidable competitor" (Tr. 6955). In fact, Procter & Gamble "was the most formidable competitor we could have encountered" (Tr. 7045).

222. According to Mr. Nelson, the Division's national sales manager:

> Procter & Gamble is a huge company. The Folger Division of Procter & Gamble is probably—probably represents 6 to 8 [58] percent of their total business. If they have a desire to move in to any piece of geography, they will do it; and in all candor, if they wanted to, they could eat us up like a Hershey bar, and the street is littered in the grocery industry with competitors of Procter & Gamble who thought that they were not going to eat them up (Tr. 5773).

223. General Foods had already experienced one major encounter with Procter & Gamble in the cake mix business. Procter & Gamble bought a regional brand, Duncan Hines Cake Mixes, and expanded it nationally, gaining significant share and volume at the expense of General Food's Swansdown brand and other brands of cake mixes (Tr. 1971). General Foods shortly thereafter discontinued the marketing of Swansdown cake mixes (Tr. 6954).

224. General Foods' management was also aware that prior to its eastern expansion Folger was the leading brand in areas where it competed with Regular Maxwell House. In this area, Regular Maxwell House's share was about 9%, while Folger's share had increased from 31% in fiscal 1967 to 40% in fiscal 1973 (CX 648Y). Furthermore, management believed that when Folger's expanded into areas where Regular Maxwell House had a major or leading share, Folger's volume grew at its expense. For example, Folger expanded into the Jacksonville district in fiscal 1959. Regular Maxwell House's share at the time was 57%, but by fiscal 1968, its share had declined to 42%, while Folger's share had increased from 5% to 22% (CX 109–E).

225. In 1959, Folger's expanded into the Chicago area with a "vigorous entry campaign" (Tr. 4503). At that time, Hills Bros. had the leading share of 35%, and Regular Maxwell House had a share of 25%. By fiscal 1972, Folger's had overtaken Hills as the leading brand, and Regular Maxwell House's share had fallen to 10.1% (CX 1072–B).

226. The strength of the Folger brand was evidenced by "frequent and repetitive" efforts to improve Regular Maxwell House's business in the west (Tr. 4499). Maxwell House Division efforts in the west were of such frequency and intensity that the A.C. Nielson Co. concluded in a report presented to the Division in mid-1971 that one reason for Folger's expansion eastward would be to force the Division

to focus on the defense of its high franchise areas and alleviate its competitive pressures on Folger's high franchise areas (CX 642Z4). [59]

227. Finally, because coffee contributed so much to General Foods' profits (Tr. 4641–43) and was so much more important to it than to Procter & Gamble, as Mr. Hunter recognized (Tr. 3045), management was aware of the profound effect a successful eastern penetration by Folger would have on those profits.

228. After considering all of the facts—*i.e.,* Procter & Gamble's prior marketing successes, the strength of its Folger brand in the west, the importance of coffee to General Foods, and Folger's perceived initial success in Cleveland,[21] I find that while Folger as a new entrant into the HFNI had to offer consumer and trade promotions below the going rates in the test markets, General Foods was justified in defending its market share and profits vigorously after realizing that Folger's entry was successful. If it had not done so, management might have threatened General Foods with a substantial decline in profits, for Mr. Klein stated in discussing the financial justification for defending (RX 518):

> I thought that the financial analysis was reasonable. It dealt with only the incremental impact, which is the proper way to deal with this kind of a decision, and in fact, it was a fairly simple decision to make. The magnitude of the numbers, the negative impact that we expected if we did nothing or did not defend, was so large that it made the decision to defend easy. It would be irrational not to defend (Tr. 8249).

229. Mr. Hunter agreed that the effect on General Foods would have been adverse if it had chosen not to defend:

> Q. . . . what would be the particular effects if General Foods had elected not to defend?
>
> A. There would be no question about it. Their Maxwell House business would have been adversely affected. It would have declined. [60]
>
> Q. Would that adverse effect have been a significant adverse affect?
>
> A. Yes, I assume it would be. Because a proportionate loss of share would have been very substantial (Tr. 3043–44).

230. Under the circumstances described above, the Maxwell House Division's belated decision to defend its market share and profits by delaying Folger's expansion into the HFNI did not result in the expenditure of an "inordinate" amount of advertising and promotion funds for, given its substantial market share in the entry cities, it is inevitable that the Division would have to spend large sums to defend (just as its western retaliation would force Folger into large defense expenditures). And, I reject complaint counsel's argument that the

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[21] Whether, in hindsight, Folger was as successful in its Cleveland introduction as General Foods claims (RPF 6–36, 6–37) or only minimally successful, according to the Nielsen figures (CRLA, p. 10), management believed at the time that Folger was a significant threat (Findings 153–55).

Division should have chosen a less expensive defense option, for the record reveals that any other decision than "defend now" would have resulted in excessive share and profit losses.[22]

(j) *The Probability Of Successfully Excluding Folger From The HFNI*

231. The immediately preceding discussion leads to a further conclusion: while General Foods hoped to delay Folger's expansion into the HFNI by making that expansion costly, no reasonably knowledgeable member of the industry would have believed that it could be excluded from the HFNI. For example, Mr. Graham of Martinson's said when asked if his company or any other coffee company could stop Folger's eastern expansion:

> No. We didn't feel that there was any way to stop Folger's from coming into that part of the country when they decided to expand into the area (Tr. 10,556; *see also* Findings 218-25). [61]

232. This conclusion is borne out by the financial analyses justifying the Maxwell House Division's defensive efforts. None of these analyses assumed that Folger could be stopped from expanding into or be excluded from the HFNI. Rather, all of the financial projections anticipated expansion throughout the HFNI by Folger (Tr. 8248–51).

3. The Effects of Folger's Entry Into The HFNI And The Maxwell House Division's Response

(a) *Introduction*

233. Folger entered the eastern markets with established profit and payout period objectives. After some initial hesitation in the first three test markets, the Maxwell House Division decided to compete vigorously with Folger for market share in these markets. As a result of the intense competition from the Division, Folger was not only unable to achieve its objectives on schedule but experienced losses in the eastern United States.

234. The intense competition between Folger and Maxwell House also resulted in losses for some roasters in these markets. Smaller companies such as Paul de Lima, Euclid and Hills were unable to compete against their larger and stronger rivals. Folger's entry and the Maxwell House Division's response were the major reasons for the decline of these companies, although there were other factors which caused the losses.

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[22] Whether General Food's profits were excessive and its defense caused it to sell its Maxwell House brand below average total or average variable cost in some of its sales districts or market areas is a separate question which is discussed *infra*.

(b) *The Maxwell House Division*

235. In Cleveland, where Regular Maxwell House's pre-entry share was 44.6% (CX 1119C), its market share grew to 49.5% in the first year after entry, and then went to 46.9%, 48.5%, and 55.7%, respectively, for years two, three and four (CX 1119C).

236. In Pittsburgh, Regular Maxwell House's share grew from the pre-entry base of 44.2% to 51.5% and 53.2%, respectively, for years one and two (CX 1119E).

237. For the entire Youngstown sales district, Regular Maxwell House's market share grew from a pre-entry base of 42.0% to 45.3%, 45.7%, 49.2%, 53.3%, and 51.3%, respectively, for years one, two, three, four, and five (CX 1387).

238. In Syracuse, without the inclusion of Horizon's market share, Regular Maxwell House's market share moved from the [62] fiscal 1974 base of 39.2%, the year prior to Folger's entry, to 41.7%, 38.4% and then 45.4%, respectively, for years one through three (CX 1387).

239. In these districts, Maxwell House was able to maintain its market share position relative to the number two brand (CX 1387).

(c) *Folger*

240. Folger's eastern expansion and Maxwell House's response resulted in losses for Folger. Its comptroller, Mr. Clark, estimated that through June 1976, in Cleveland, Pittsburgh and Syracuse, Folger had cumulative losses of $10,369,000. In Cleveland, 57 months after its entry, Folger had a cumulative loss of $3,050,000 (CX 980). In Pittsburgh, 44 months after its entry, Folger had a cumulative loss of $3,174,000 (CX 981). In Syracuse, 21 months after its entry, Folger had a cumulative loss of $4,145,000 (CX 982).

241. The Maxwell House Division's response to Folger's expansion into the east was undoubtedly the main reason for the substantial losses incurred by Folger, but Mr. Hunter recognized that increased competitive expenditures by Chase & Sanborn and Hills Bros. in response to its entry also affected Procter & Gamble's ability to attain its objectives (CX 570A; Tr. 3050–51).

242. Although Folger suffered losses in the sales districts that it entered, Mr. Clark testified that an analysis of the profitability of Folger's coffee is meaningful only on a national basis (Tr. 3143), and Folger's national sales and profitability reveals that it suffered no overall competitive injury (RX 1080C).

243. For the year ending June 30, 1970, Procter & Gamble's sales of Folger's coffee were 284.4 million pounds. For the year ending June 30, 1976, sales of Folger's coffee had increased to 328.6 million, an increase of 15% (RX 1069B). During roughly the same period, total

consumption of ground coffee declined nationally by 10% (RX 1105B). During that same period, sales of Regular Maxwell House coffee declined by approximately 12% (RX 1105B, 1107A).

244. Procter & Gamble financed the expansion of Folger's coffee from Folger Coffee Co. profits in its "Folger area," the area of the country where it had the leading share (Tr. 2891). An exhibit specially prepared by Procter & Gamble for complaint counsel reported the following profits on Folger's in the "Folger area:" [63]

Calendar	1972	$17,698,000
	1973	$ 7,961,000
	1974	$18,884,000
	1975	$33,689,000

(CX 552A–B).

245. Maxwell House's response resulted in a longer payout period for Folger. Payout refers to the length of time it will take to reach a break even position on a cumulative basis. It is the time it takes for cumulative profits to offset initial introductory spending (Tr. 3214).

246. Folger's estimated payout for the plan implemented in Cleveland was 22 months (CX 491B; Tr. 2713). This estimate anticipated a response by the established brands (CX 491B), but the response by General Foods was not what was expected (CX 495A–B, 520A).

247. Folger estimated that increasing its marketing effort to respond to a second round of increased Maxwell House activity would raise the Cleveland payout to 33 months (CX 497F, 518A).

248. By the end of 1974, approximately 38 months after entry, Folger had not achieved payout in Cleveland (CX 553I; Tr. 3246–47). Folger did not continue to calculate its payout for Cleveland. However, given the volume performance and the amount of money Folger was spending in Cleveland, the payout would probably have been, according to Mr. Hunter "infinity" (Tr. 3103).

249. The principal reason for Folger's inability to achieve its payout goal in Cleveland was the Maxwell House response (Tr. 2786–87).

250. After its experience in Cleveland, Folger increased the projected payout period for its expansion plan for Pittsburgh to 35 months (CX 498A, 538B).

251. Forty-two months after its entry into Pittsburgh, Folger had not achieved payout (CX 553, 981). The unusually strong response of Maxwell House was the key reason for Folger's lack of success in Pittsburgh (CX 539A–B).

252. General Foods concluded that Maxwell House's response had resulted in Folger's payout being extended to 68–85 months (CX 649E).

253. While there is some testimony that Folger's projected payout was unrealistic (CX 493A; Tr. 4625–26), the Maxwell House Division's response was certainly one cause of Folger's failure to meet it. [64]

(d) *Other Roasters*

254. Folger's eastern expansion and the Maxwell House Division's response severely restricted the ability of some other industry participants to compete and caused them substantial monetary and volume losses.

(1) Paul de Lima

255. The Paul de Lima Coffee Co. is a small coffee roaster in the Syracuse, New York area that reported a net worth of $512,900 in 1975 and a net worth of $547,636 in 1977 (RX 1072A; Tr. 2577–79). The de Lima Coffee Company marketed coffee to institutional customers, to office coffee service customers, and to grocery customers (Tr. 2503).

256. Prior to Folger's entry in 1975, de Lima sold regular coffee to retailers in a 60 mile radius around Syracuse (Tr. 2504). de Lima's retail business was profitable prior to October 1974 (Tr. 2513).

257. de Lima lowered its price during the first nine months of 1975 in an attempt to remain competitive with Folger and Regular Maxwell House (Tr. 2521). During the summer of 1975, de Lima realized that it was losing too much money in grocery operations. de Lima had to make a choice as to whether to continue selling below cost, thereby endangering the whole company, or to attempt to price at a more realistic level and take the chance of losing volume. de Lima made the decision to raise its wholesale prices to a level it considered more realistic (Tr. 2522).

258. After de Lima chose to stop selling its coffee at a loss, the firm suffered an 80% drop in retail sales (CX 1068C; Tr. 2522). The low prices of Regular Maxwell House and Folger also caused de Lima to reduce its distribution area from a 60 mile radius around Syracuse to a 10 mile radius (CX's 607, 1068D; Tr. 2526–27). Because of the severe drop in sales, de Lima was forced to dismiss two of its three salesmen (Tr. 2527).

259. Because of the battle between Folger and the Maxwell House Division, de Lima's retail coffee business incurred substantial losses (Tr. 2536); however, the Division's response to Folger's expansion into the east was not the only cause of the losses suffered by de Lima. [65]

260. In the eight years prior to the Procter & Gamble expansion into the Syracuse sales district, de Lima's grocery sales of ground coffee had declined from 976,000 pounds in 1966 to 613,857 pounds by 1973, a decline of approximately 37% (RX 887).

261. Prior to Folger's expansion into Syracuse, de Lima had not

advertised its coffee, had not used any consumer promotion devices or retailer coupons and only used trade promotions from time to time (Tr. 2506–08, 2566). According to Mr. de Lima, "[w]e have never been convinced of the merit of [retailer coupons and consumer coupons] and we do not have the administrative facilities to control them" (Tr. 2506).

262. Mr. de Lima testified that one factor in his loss of business was the increase in the price of coffee caused by the Brazilian frost, increases which, because of his small inventory of coffee and inventory accounting system, resulted in immediate increasing costs for his coffee (Tr. 2586–87). Due to this increase in costs, Mr. de Lima's wholesale price was above the price of Regular Maxwell House and Folger's (Tr. 2593); nevertheless, most of de Lima's sales losses were not due to the frost (Tr. 2597).

263. de Lima is still in the coffee business today and is the leading seller of institutional coffee in the Syracuse area (Tr. 2572, 2590).

(2) Euclid

264. Since 1928, Euclid Coffee, located in Cleveland, Ohio, has sold its regular coffee products to retailers in all of Ohio and surrounding areas (Tr. 2601–02).

265. In 1970, Euclid's coffee sales were about $2.25 million (Tr. 2608). The Euclid Coffee Company was profitable in 1970, making about four or five cents per pound (Tr. 2608).

266. The increased levels of promotions and couponing by Maxwell House and Folger after its entry into Cleveland drastically reduced Euclid's sales (CX 611; Tr. 2615). For example, Euclid's yearly sales to Fisher Foods, its largest retail customer, dropped from 14,580 cases (10,380 tins + 4200 bags) in 1971, to 2,045 cases in 1974 (CX 612A; Tr. 2621).

267. Euclid's sales drastically declined because its products were selling for a higher retail price than Maxwell House's and Folger's, and the product did not, therefore, move off the shelf (Tr. 2616–17). [66]

(3) Hills

268. During the period of Folger's entry, recommendations were made that Hills Bros. should meet the level of promotion existing in the Youngstown and Syracuse markets. Hills Bros. could not afford to meet these promotions, because to do so would, in the opinion of Mr. Toy, result in the sale of its coffee below its cost of goods (Tr. 2213).

269. The effect of the decision by Hills Bros. not to meet the Maxwell House and Folger promotions was that Hills Bros. suffered severe market share losses. For example, during 1971 through 1977, Hills

Bros.' market share in the Youngstown sales district dropped from a pre-entry level of 15.8% (CX 1072A) to 8.5% (CX 1072G). In the Syracuse sales district, Hills Bros.' market share went from a pre-entry level of 11.0% (CX 1072D) to a 1977 level of 6.9% (CX 1072G).

270. Hills Bros.' market share losses were nearly 50% of its pre-entry level shares. Had Hills Bros.' market share losses been proportional to its previous share position, it would have lost less than 20% (CX 130C; RX 518A; Tr. 3010).

271. The pricing of Maxwell House and Folger was not the only cause of Hills Bros. decline, however, for prior to the time of Procter & Gamble's expansion into the Cleveland and Pittsburgh area, the grocery trade there did not regard Hills Bros. as a successful marketer of ground coffee because of its failure to maintain a consistent product quality and its lack of consumer promotions (Tr. 1698–1700). In fact, Mr. Engel of Kroger regarded Hills Bros.' merchandising activities in Cleveland as "dumping" the product there when Hills Bros. had excess capacity (Tr. 1698).

272. According to Maxwell House Division salesmen, grocery trade factors in Syracuse also reported a decline in the quality of Hills Bros. coffee (Tr. 5992–93).

273. Hills Bros.' share has declined not only in the areas of alleged predation, but throughout all areas of the country. In Hills Bros.' three areas of greatest share strength, its share dropped by 24%, 39% and 48% during the period fiscal year 1972 through fiscal year 1980 year to date (RX 1117). Specifically, Hills Bros.' share declined from 32.7% to 24.8% in Chicago, from 23.7% to 12.4% in Detroit, and from 11.8% to 7.2% in Los Angeles (RX 1117). These three areas in fiscal year 1972 accounted for over 53% of Hills Bros.' total national volume (RX 1117). [67]

4. Regular Maxwell House's Market Power

(a) *Introduction*

274. "Market power," which Drs. Mann and Elzinga agree is synonymous with the term "monopoly power" (Tr. 3630, 9501–02) is, according to Dr. Mann, the ability of a firm to maintain price persistently above the levels that would occur under full competitive pressure (Tr. 3577, 3630). Market power is identified by evaluating the structure of an industry within a relevant geographic market. This analysis looks at market share relationships, pricing conduct, and performance (profitability) (Tr. 3577–78, 9498–9500).

(b) *National Market Shares Of Regular Coffee Producers*

275. In fiscal 1971, Regular Maxwell House's share of the national regular coffee market was 24.1%; Folger's national share was 19.1% (RX 1107A).[23] At the time of Procter & Gamble's expansion into Cleveland, its Folger's brand was sold in an area of the country that included 55% of the national population and that accounted for almost 60% of total ground coffee sales (Tr. 3016). Folger's had the leading share throughout that area, running about 33% to 34% (CX 491A; Tr. 3017). In certain parts of its area of distribution, Folger's had over a 50% share (CX 1072A).

276. As a result of share gains from its eastern expansion, Folger became the leader in the national regular coffee market in 1979. This dominance continued in 1980 (RX's 1107A, 1279).

(c) *Regular Coffee Shares In The East*

277. In fiscal 1972, which marked the beginning of Folger's expansion into the eastern United States, Regular Maxwell [68] House's share in that area was 38.5%; Folger's share was 5.8%. The latest Nielsen data shows that Regular Maxwell House's share has declined in that area while Folger's has grown substantially (RX 1279).

(d) *Regular Coffee Shares In The Eastern Sales Districts*

278. Absolute market shares of General Foods' regular coffee brands and its Maxwell House brand in the eastern sales districts from 1971–1977 were:

Market Shares Of All General Foods' Regular Coffee Brands

Sales District	1971	1972	1973	1974	1975	1976	1977
Atlanta	37.5	39.5	44.9	47.9	48.4	42.2	45.1
Boston	44.2	45.6	49.6	50.1	49.1	47.1	43.3
Charlotte	47.7	47.4	50.3	49.9	50.1	48.9	38.6
Jacksonville	44.3	46.1	48.6	50.9	47.3	48.5	45.7
New York	35.2	36.1	40.4	40.2	40.4	38.0	34.9
Philadelphia	49.6	47.9	55.4	55.6	51.9	49.8	41.4
Syracuse	41.3	44.4	48.9	48.6	51.1	46.2	52.5
Youngstown	46.4	49.8	53.3	56.9	61.4	60.1	55.7

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[23] Although General Foods objects to any market analysis which focuses only on Regular Maxwell House (RPF 3-1), Dr. Elzinga testified that analysis of this brand's market power is appropriate because it is General Food's "flagship" coffee brand (Tr. 9787–88).

Market Shares Of Regular Maxwell House

Sales District	1971	1972	1973	1974	1975	1976	1977
Atlanta	32.9	34.6	37.5	40.1	39.5	34.2	38.5
Boston	40.1	40.8	40.8	40.5	39.1	38.2	35.9
Charlotte	41.3	40.5	41.8	41.2	41.5	40.2	32.2
Jacksonville	41.5	42.8	42.7	43.9	39.6	41.5	40.1
New York	29.8	29.9	29.9	28.3	29.9	28.4	26.2
Philadelphia	45.1	42.5	45.1	45.6	41.7	39.7	33.4
Syracuse	36.4	37.7	40.8	39.2	41.7	38.4	45.4
Youngstown	42.0	45.3	45.7	49.2	53.3	51.3	48.3

279. The latest Nielsen data reveal that Regular Maxwell House's share of regular coffee sales in the Youngstown, Philadelphia and Syracuse sales districts has declined from its market share in those sales districts at the time of Folger's entry into each of them, whereas Folger has achieved a substantial share in each of these districts (Compare Finding 278 with RX 1279). [69]

280. The shares of Regular Maxwell House and its next largest competitors in the eastern sales districts from 1971–1977 were:

Market Shares Of Regular Maxwell House And The Next Largest Competitor

Sales District	1971	1972	1973	1974	1975	1976	1977
Atlanta							
RMH	32.9	34.6	37.5	40.1	39.5	34.2	38.5
#2 Brand	15.0	12.9	12.5	11.6	11.1	8.8	7.6
	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)
Boston							
RMH	40.1	40.8	40.8	40.5	39.1	38.2	35.9
#2 Brand	10.2	9.6	9.5	8.3	9.8	9.5	9.5
	(H)*	(CS)	(CS)	(CF)	(H)	(CF)	(CF)
Charlotte							
RMH	41.3	40.5	41.8	41.2	41.5	40.2	32.2
#2 Brand	14.1	13.8	12.0	12.7	11.8	12.1	8.9
	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)
Jacksonville							
RMH	41.5	42.8	42.7	43.9	39.6	41.5	40.1
#2 Brand	20.8	21.0	20.2	17.7	19.4	14.8	14.9
#2 Brand	(F)	(F)	(F)	(F)	(F)	(F)	(F)
N.Y.							
RMH	29.8	29.9	29.9	28.3	29.9	28.4	26.2
#2 Brand	13.7	14.1	12.6	14.1	18.7	18.2	12.8
	(S)	(S)	(S)	(S)	(CF)	(CF)	(CF)
Philadelphia							
RMH	45.1	42.5	45.1	45.6	41.7	39.7	33.4
#2 Brand	9.7	10.3	10.4	7.8	10.0	7.7	10.0
	(H)	(CS)	(CS)	(CS)	(F)	(H)	(F)

Sales District	1971	1972	1973	1974	1975	1976	1977
Syracuse							
RMH	36.4	37.7	40.8	39.2	41.7	38.4	45.4
#2 Brand	17.1	17.4	14.9	14.0	11.1	17.7	21.7
	(H)	(CS)	(CS)	(CS)	(CS)	(F)	(F)
Youngstown							
RMH	42.0	45.3	45.7	49.2	53.3	51.3	48.3
#2 Brand	15.8	12.5	11.3	13.8	14.7	13.1	16.2
	(H)	(H)	(H)	(F)	(F)	(F)	(F)

CS = Chase & Sanborn; CF = Chock Full O'Nuts; F = Folger; H = Hills; S = Savarin.

* (CS) also had a share of 10.2 [70]

281. The relative market share ratios (Regular Maxwell House share divided by share of second largest brand) were:

Relative Market Shares

Sales District	1971	1972	1973	1974	1975	1976	1977
Atlanta							
Ratio	2.19	2.68	3.00	3.46	3.56	3.89	5.07
#2 Brand	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)
Boston							
Ratio	3.93	4.25	4.29	4.88	3.99	4.02	3.78
#2 Brand	(H)*	(CS)	(CS)	(CF)	(H)	(CF)	(CF)
Charlotte							
Ratio	2.93	2.93	3.48	3.24	3.52	3.32	3.62
#2 Brand	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)
Jacksonville							
Ratio	2.00	2.04	2.11	2.48	2.04	2.80	2.69
#2 Brand	(F)	(F)	(F)	(F)	(F)	(F)	(F)
N.Y.							
Ratio	2.18	2.12	2.37	2.01	1.60	1.56	2.05
#2 Brand	(S)	(S)	(S)	(S)	(CF)	(CF)	(CF)
Philadelphia							
Ratio	4.65	4.13	4.34	5.85	4.17	5.16	3.34
#2 Brand	(H)	(CS)	(CS)	(CS)	(F)	(H)	(F)
Syracuse							
Ratio	2.13	2.17	2.74	2.80	3.76	2.17	2.09
#2 Brand	(H)	(CS)	(CS)	(CS)	(CS)	(F)	(F)
Youngstown							
Ratio	2.66	3.62	4.04	3.57	3.63	3.92	2.98
#2 Brand	(H)	(H)	(H)	(F)	(F)	(F)	(F)

(CX 1072) [71]

282. Complaint counsel argue that Regular Maxwell House's absolute and relative share dominance of regular coffee sales in the western districts, its "product differentiation" advantage, its ability to command a price premium, and its supracompetitive profits (CLA, p. 111) evidence its market or monopoly power—that is, the power to control prices or exclude competition (CLA, p. 109). They claim support for their conclusion in statements made by industry members.

(e) *Regular Maxwell House's Market Power As Viewed By Its Competitors, Employees And Agents*

(1) Trade Dealing

283. Trade dealing, which accounts for 80–90% of Maxwell House's marketing funds, is the most important element of the marketing mix for regular coffee (CX's 14Z, 203D; Tr. 1555).

Mr. Einloth testified that:

> The concept that was commonly accepted was that if Maxwell House has a larger share of the business than competition and the strengths of the franchises is (sic) reflected in that share from the standpoint of trade dealing, we should be able to spend less than competition (Tr. 1589).[24] **[72]**

284. Other General Foods documents recognize that share dominance makes it possible to keep trade dealing down and increase regular coffee profitability (CX's 74S, 90E, 96E, 190R, 205Z–5, 633F, 637L, 646L, 691C).

285. Ogilvy & Mather issued studies in 1972 and 1975 which argued that the larger the market share of Regular Maxwell House relative to the share of the second largest brand in the market, the less the Maxwell House Division had to trade deal and the greater was Regular Maxwell House's profitability. These studies found that there was a high statistical correlation between the level of Regular Maxwell House's share dominance over the second leading brand and its ability to have lower trade deals and make greater profits. The statistical correlations were .7 and .9 (the highest possible correlation is 1) (CX's 1L, 679A).

286. The first analysis indicated that in Maxwell House's high franchise sales districts "there is a high level correlation between the extent of share dominance and profitability. The coefficient is .7. This is very significant when you consider that a coefficient of 1.0 would indicate that share dominance explains all the variation in profit" (CX's 1L, 468K).

287. Mr. William Phillips, Ogilvy & Mather's chairman, testified that the analysis proves "something everybody knows," that is, when your franchise is dominant in a trading area:

> You have less need to promote with the trade to get trade cooperation in the consumer offers and, if there are two or three brands about the same in share and position, its

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[24] In a document which he authored, Mr. Einloth stated:

> Evidence that 2X share leverage results in ability to underspend competition can be found in RMH history in the East. In nearly all of our Eastern or noninfringement markets (areas where Folger is not in distribution) RMH enjoys a minimum share advantage by pack-size of twice that of its nearest competitor. Competitive trade dealing has always been considerably higher than RMH, sometimes by as much as $3.00/case, but the Brand has been able to withstand it, build its share and improve its margin less deal position (CX 725E).

> a much more competitive environment and your trade deals are high and your contribution[25] is lower (Tr. 1947). [73]

288. A second study by Ogilvy & Mather came to the same conclusion as the first, except that the correlation between share leadership and Maxwell House profitability had increased from .7 to .9 (CX 679A).

289. An additional conclusion of the first study was that when another brand reached the 20% market share range, profitability for Maxwell House (CMLTD) began to decrease (CX1D, 468C). When there is a second brand with a market share above 20%, it meant that Maxwell House's profit decreased by about $.50 per unit (CX's 1D, 468C). The analysis also concluded that if Maxwell House could keep Folger below the 20% share level, Maxwell House could earn an additional $8 million in long-term profit (CX1D, 468C; Tr. 1439–40).

290. The Maxwell House Division adopted trade dealing practices which recognized the significance of share dominance:

> For each district, market area, and dealing area, RMH share vs. competition is tracked. Depending on the RMH to competitive share ratio, RMH deals at a different level keying only to significant competition (CX's 194Q, 195Q).

291. The Maxwell House Division's fiscal 1973 marketing plan describes the HFNI as the area where:

> RMH is the dominant brand with no significant competition.[26] RMH's leverage[27] is great with spending generally independent of competition (CX 14Z–1). [74]

292. The fiscal 1972 through 1976 marketing plans for Maxwell House state that in the HFNI, the Division could "spend below competition" on trade deals (CX's 13D, M, Z–10, 14P, Z–1, 15G, 16K, W, 18K, Z–18, 19R, Z–28).

293. General Foods recognized that in the high franchise sales districts, Regular Maxwell House's trade rates were less than in the low franchise sales districts. In the fiscal 1975 Marketing Plan, the trade rates per unit for 1973 and 1974 were:

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[25] Contribution margin is the amount remaining from net revenue after deducting the cost of goods sold. It is the amount available for marketing and profit (Tr. 1248).

[26] Mr. Einloth testified that the phrase "no significant competition" referred to the fact that "[t]here was no single competitor whose presence was found throughout the entire non-infringement area" but that "[t]here was significant competition by area within the non-infringement markets" (Tr. 1611).

[27] Meaning that the Division was able to use lower trade deals than its competitors in the area (Tr. 1417–18, 1552–53).

	HFNI	HFI	LF
1973	1.13	1.42	2.40
1974	1.42	1.54	2.45

(CX 16Z–36).

294. Its competitors confirmed that the Division trade dealt less heavily in areas where it had a dominant[28] market share (Tr. 2026, 2847, 2878), and, in some areas, had higher dead net prices than its competitors.

295. Mr. Trone testified that Regular Maxwell House had higher dead net prices than Hills Bros. and Chase & Sanborn (Tr. 1384, 1505).

296. In Cleveland and Pittsburgh, prior to Folger's entry, Regular Maxwell House's case rate (non-performance and performance allowances) generally was less than other competitors, up to $1.50 per case less. Thus, the list price less case rate for Regular Maxwell House was up to $1.50 higher than the other competitors (Tr. 1647–48, 1681–82).

297. Prior to Folger's entry into the Charlotte and Atlanta sales districts, Regular Maxwell House did not meet competitors' trade rates on a continuing basis; when it was not meeting the competitive trade rates, its dead net price was above the dead net prices of its competitors (Tr. 6636–37).

298. Prior to Folger's entry into Syracuse, Regular Maxwell House's trade deals were lower than those of Hills Bros. and Chase & Sanborn. Under both "trade dead net" (list price less **[75]** non-performance and performance allowances) and "consumer dead net" (list price less non-performance and performance allowances and retailer coupons) it had a higher price than Hills Bros. and Chase & Sanborn. In terms of "consumer dead net," there could be a $.10 per pound differential (Tr. 6026–32, 6035–39).

299. An analysis by Mr. Toy of the dead net price differences between Hills, Regular Maxwell House, and Chase & Sanborn in the east prior to the entry of Folger indicates that Regular Maxwell House commanded higher prices than Hills Bros. and Chase & Sanborn. In this analysis, Mr. Toy cumulated the net price differences between Regular Maxwell House, Hills Bros., and Chase & Sanborn on all three pack sizes for a period of seven months (CX 866H–I; Tr. 2046, 2152–54).

300. The analysis for the areas dominated (as Mr. Toy defined the word) by Maxwell House indicates that:

> In Philadelphia, Regular Maxwell House's cumulative dead net price was 15 cents

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[28] Defined by Mr. Toy of Hills Bros. as the situation in which "Maxwell House has far and away the largest share of market and the next nearest competitors have roughly less than half of the share that Maxwell House would have" (Tr. 2026).

higher than Hills' and 23 cents higher than Chase's.[29]

In Pittsburgh, Regular Maxwell House's cumulative dead net price was 7 cents higher than Hills' and 12 cents higher than Chase's.

In Cleveland, Regular Maxwell House's cumulative dead net price was 26 cents higher than Hills' and 17 cents higher than Chase's.

In Detroit, Regular Maxwell House's cumulative dead net price was 16 cents higher than Hills' and 24 cents higher than Chase's.

In Boston, Regular Maxwell House's cumulative dead net price was 4 cents higher than Hills' and 13 cents higher than Chase's.

In Albany, Regular Maxwell House's dead [76] net price was 5 cents higher than Hills' and 17 cents higher than Chase's.

In Buffalo, Regular Maxwell House's cumulative dead net price was 6 cents higher than Hills' and 15 cents higher than Chase's (CX 866I; Tr. 2045–46, 2050).

301. In a study of Philadelphia, Mr. Toy found that Maxwell House sold at higher net prices to the trade than Hills Bros. and Chase & Sanborn for 21 consecutive months between February 1968 and October 1969. The average difference in price between Maxwell House and Hills Bros. over the two years was over 2.6 cents per pound and the average difference between Maxwell House and Chase & Sanborn was over 2.9 cents per pound (CX 872C; Tr. 2059).

(2) Price Leadership

302. The Maxwell House Division's competitors sometimes priced their products with reference to Regular Maxwell House. From 1971 to 1977, Kroger "pegged" the price of its private label coffee to the price of Regular Maxwell House. Its prices were set about 5 cents below Regular Maxwell House's prices (Tr. 1651). de Lima Coffee Company primarily looked at the price of Regular Maxwell House in setting the price for its coffee because Regular Maxwell House was the number one brand in the market. It set its price so that it would have a lower shelf price than Regular Maxwell House (Tr. 2507–08). Hills Bros. also priced its coffee in relationship to Regular Maxwell House's prices so that it could obtain a lower shelf price, for it believed that it required a lower shelf price than Regular Maxwell House in order to maintain its sales volume (Tr. 2036–37).

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[29] Price per pound over a seven month period. Thus, the 15 cent difference averaged, per month, 2 cents per pound (Tr. 2045–46).

(3) Competition Within The HFNI

303. All of the above notwithstanding, Regular Maxwell House's share dominance in the HFNI did not mean that it could ignore the pricing and trade and consumer dealing of its competitors, nor was its dominance so great that it could exclude competitors from the HFNI.

304. Thus, despite the statement in CX 14Z-1 that Regular Maxwell House's spending is independent of competition (Finding 291), the same document points out that trade promotions "maintain competitive pricing and feature activity [77] necessary for the short-term health of the franchise" (CX 14Z), and that 45% of the $40 million trade deal expenditures for the brand would be spent in the HFNI. This is convincing evidence that the Division could not simply ignore its competition in that area.

305. Mr. Graham, who has had extensive experience with the Maxwell House Division, Martinson's and Standard Brands (Chase & Sanborn) testified that Regular Maxwell House was, and had to be, competitive in the east prior to Procter & Gamble's eastern expansion. Had it not been, "the grocery trade would have tended to lean much heavier toward the brands where they received larger offers, and Maxwell House would have lost ground, would have lost sales and share of the market" (Tr. 10,544–45). In the east, prior to Procter & Gamble's expansion, according to Mr. Graham, Regular Maxwell House could not charge higher than competitive prices to the grocery trade, could not control the price of coffee, and could not command a premium price over other coffees (Tr. 10,545). In fact, Martinson's and brands other than Regular Maxwell House were sold at a premium price in the east (Tr. 10,563–64).

306. Mr. Graham considered the eastern United States even prior to the expansion of Procter & Gamble to be the most competitive portion of the country (Tr. 10,541). This is because the east had a number of strong regional brands that were marketed vigorously in addition to a number of national brands. The national brands, in addition to Regular Maxwell House, were Hills Bros. and Chase & Sanborn, and the strong regional brands were Savarin, Chock Full O'Nuts and Martinson's, all of which were marketed "on almost the entire eastern seaboard" (Tr. 10,542). Mr. Graham's opinion as to the competitiveness of the east is shared by the Maxwell House Division's national sales manager (Tr. 5747).

307. Again, despite the sweeping statements in the documents discussed above, knowledgeable witnesses testified that Regular Maxwell House could not ignore its competitors in the eastern sales districts. Mr. Trone testified that New York "used to give us a fit" in terms of competitive marketing expenditures (Tr. 1473), and that

Regular Maxwell House competed with Standard Brands, Hills and was faced with "formidable COB (Chains' own brand) competition." Because coffee was so price sensitive, the consumer would switch to a coffee whose trade deals were reflected on the shelf, and General Foods would have to react to that or lose volume (Tr. 1474–76).

308. Mr. Mann, who is the Maxwell House Division's eastern region sales manager, testified that in New York, Regular Maxwell House responded to major competitors through a diversified marketing approach using consumer promotions, advertising and trade deals (Tr. 6481). It did not always match [78] its competitors penny for penny on trade deals, but also employed advertising and consumer promotions. By contrast, its competitors in New York concentrated on trade deals "with very little attention to the advertising and consumer promotion components of the mix." In some instances, Regular Maxwell House matched competitive deals penny for penny or even exceeded the level of competitive deals (Tr. 6482–83). Despite these efforts, during the three years immediately prior to Procter & Gamble's entry into New York, Regular Maxwell House had been losing share (Tr. 6487).

309. In Boston, Regular Maxwell House's major competitors prior to Procter & Gamble's expansion were Chock, Hills Bros., Chase & Sanborn and COB (Tr. 6479). Regular Maxwell House responded to the trade deals of competitors in Boston in much the same way as in New York, sometimes matching them penny for penny, sometimes exceeding them, and sometimes not matching them exactly but relying instead on advertising and consumer promotions (Tr. 6482). Despite these efforts, Regular Maxwell House in Boston, as in New York, had been losing share during the three years prior to the Procter & Gamble expansion (Tr. 6487).

310. A June 1, 1976 Maxwell House Division memorandum entitled Eastern Complex Revised Dealing Strategy reported that Regular Maxwell House's share was declining in all areas of the complex, which is comprised of the Boston, New York and Philadelphia sales districts. The cause was stated to be chains-own-brands: "the magnitude of RMH's losses in Boston and Philadelphia reflect significant on-going shelf/feature price disadvantages to RMH's largest competitor in both markets, COB" (CX 192B). The share decline in New York was attributed to significant shelf and feature price disadvantages versus COB, but "major shelf price disadvantages to CFON (Chock Full O'Nuts) have impacted RMH more significantly than COB in New York" (CX 192C). The memorandum concluded that "RMH will continue to risk suffering share declines throughout the complex as long as feature activity remains suppressed and RMH experiences differentials vs. COB and CFON of the current magnitude" (CX 192E).

311. A December 2, 1976 Maxwell House Division memorandum reported on the inability of Regular Maxwell House to ignore competition in New York and Boston:

> In New York and Boston, CFON and Savarin are taking their toll on RMH. We are attempting to stay competitive but are finding more and more trade resistance to featuring coffee (CX 689B). [79]

312. Mr. Keller, the Maxwell House Division's southern regional sales manager, testified that the Division had to be responsive to competitors in that area (Hills Bros., Chase & Sanborn, Chock Full O'Nuts, COB and smaller local competitors) (Tr. 6590–94).

313. In Detroit, Atlanta and Charlotte, Regular Maxwell House used a balanced marketing mix which included advertising and consumer promotion as well as trade promotion. Most of Regular Maxwell House's competitors used trade offers as their primary means of marketing. They did very little advertising or consumer promotion, in Mr. Keller's opinion (Tr. 6595).

314. To assure that the retail grocery trade would price it competitively with other brands, Regular Maxwell House had to offer trade deals competitive with other manufacturers in Mr. Keller's region. Otherwise, "the consumer will walk right by us and pick up a competing product," because if competitors had better trade deal programs, the trade would feature them and not Regular Maxwell House (Tr. 6596).

315. Procter & Gamble was an established competitor in the Jacksonville sales district in fiscal 1971 with a share of 20.8% (CX 1072A). The Jacksonville sales district was part of the high franchise infringement area, an area where the Division regarded Folger's and Regular Maxwell House as equal in size and strength and where the Maxwell House Division regarded the competition as being "fierce" (CX 14Z–1).

316. According to the head buyer for S.M. Flickinger's, a major wholesaler in the Buffalo area, Regular Maxwell House's list price and trade promotional allowances equalled those of Hills Bros. and Chase & Sanborn prior to the time of Folger's expansion there (Buffalo is in the Syracuse sales district) (Tr. 11,859–60), and he believed that if it was not competitively equal with Hills Bros. and Chase & Sanborn, it would cease to be a popular brand:

> It's that competitive. We wouldn't feature them. They wouldn't have the same retail [price] and the consumer wouldn't pick them up (Tr. 11,860).

317. The Division's Syracuse sales district manager also confirmed that during the period 1964 up to the time of Folger's entry, Regular Maxwell House would be competitive with the offerings of Hills Bros.,

Chase & Sanborn and Beechnut by making [80] its dead net to the consumer[30] the same as these brands (Tr. 5943). Specifically, Regular Maxwell House had to respond to the offerings of these brands:

> Any one of those two brands could have had Maxwell House for lunch if we did not respond to their trade offer. Coffee is a very volatile, volatile product. The customer is well aware of what the price is. It's featured quite frequently. If the price is right and the quality is there, brand loyalty goes out the window (Tr. 6156).

At times from 1970 to the date of Folger's expansion, there were periods when Regular Maxwell House's consumer dead net and trade dead net were lower than that of Hills Bros., particularly during holidays or other special merchandising events (Tr. 6196–97).

318. Mr. Engel of Kroger testified that prior to the expansion of Procter & Gamble, Regular Maxwell House competed with Hills Bros., Chase & Sanborn, COB, Chock Full O'Nuts and Breakfast Cheer (Tr. 12,063), and he stated that Regular Maxwell House's prices were comparable with other brands, as were its promotional activities (Tr. 12,064).

319. He also stated that Regular Maxwell House had the leading share in both Cleveland and Pittsburgh at the time of Folger's entry because it had the product quality desired by the consumer, it utilized consumer promotion and it provided "incentive to the trade to support the product at retail" (Tr. 1696).

320. Mr. Engel further testified that Regular Maxwell House did not have the ability to control either the retail price of coffee or the price charged by others to the grocery trade in the Cleveland and Pittsburgh areas, and Mr. Metzger stated that the grocery trade in the Buffalo area would not feature Regular Maxwell House if its trade promotions did not equal Hills Bros.' and Chase & Sanborn's (Tr. 11,860, 12,070).

321. Convincing evidence that the Maxwell House Division could not exclude competitors from the HFNI is the successful [81] expansion of both Hills and Folger into that area, and the expansion of regional roasters within the HFNI.

322. Hills Bros. increased its national share from 9.6% in fiscal 1963 to 11.2% by fiscal 1968, with most of the increase attributable to expanded distribution in the "new Eastern areas" (CX 11Z–7). Hills Bros. formally introduced its coffee into the Cleveland area in 1962, the Pittsburgh area in 1963, the Syracuse sales district in 1964, the Boston sales district in 1965, the Philadelphia sales district in 1966, and the New York sales district in 1967 (RX 1116).

323. As of fiscal 1971, Hills had established a share of 17.1% in the

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[30] List price minus buying allowances, performance offers and RECU's. "Trade dead net" excludes RECU's (Tr. 5941).

Syracuse sales district and 15.8% in the Youngstown sales district (CX 1072A). Hills Bros.' eastern expansion was regarded as a successful expansion by both Hills Bros. and by the Maxwell House Division (Tr. 2130, 5793).

324. Other Maxwell House Division competitors have increased their business within the HFNI. Through the use of a new advertising campaign and "aggressive" use of trade promotions, Martinson's increased its share in New York from 9% in 1971 to 13.5% in 1973 (Tr. 10,562–63). In the Syracuse, Boston and New York sales districts, Chock Full O'Nuts has increased its share above its fiscal 1978 levels (RX 1278). Savarin coffee increased its share in the New York sales district over its fiscal 1978 share level (RX 1278). It also increased its share considerably in the Jacksonville sales district during the period fiscal 1971 through 1977 (CX 1072A, G). In early 1976, Savarin commenced a "major introduction" in the Baltimore-Washington area (CX 681E).

(4) Conclusion

325. Although it is apparent that the Maxwell House Division did not believe it was necessary to meet the trade deals of all competitors at all times in the HFNI, the Division did not control the amount of trade dealing in the sales districts, for it ignored its competitors' offers at its peril, even before Folger entered the HFNI. Stated simply, if the Division had not trade dealt along with some of its competitors in the HFNI, it would have lost market share.

326. Furthermore, complaint counsel emphasize trade dealing and ignore the other aspects of the marketing mix, *i.e.*, advertising and consumer promotion. Although expenditures in these areas were less than for trade promotions (10–20% of the marketing mix), the Division used advertising and consumer promotions more than its competitors, and concentrating solely on its trade promotions gives a false picture of its competitive [82] activity in the HFNI. For example, according to Professor Dearden (*infra*), Regular Maxwell House spent more in HFNI sales districts than in low franchise districts on advertising and consumer and trade promotions in 1973 and 1977 (CX's 987Z–67 to Z–85, Z–147 to Z–166). While these expenditures were undoubtedly influenced by the response to Folger's and Regular Maxwell House's greater sales volume in the HFNI, they certainly cast doubt on the claim that Regular Maxwell House had no significant competition in the east.

327. Furthermore, ignoring consumer promotions is inconsistent with Dr. Mann's definition of "economic price" which deducts these promotions from list price. Because the Division emphasized consumer promotions, ignoring them tends to raise the price the Division

charged vis-a-vis its competitors. The same problem exists with Mr. Toy's charts, for they do not include RECU's in his definition of price (Tr. 2040).

328. The problems with complaint counsel's inconsistent definition of price and the testimony of industry members indicate to me that, despite the inflated rhetoric of some Maxwell House Division personnel, the Division could not ignore competition in the HFNI, did not "control" price in the HFNI, and, in view of Hills' and Folger's successful expansions into that area, could not exclude competition from the HFNI.

329. Finally, aside from making the claim, complaint counsel offer no evidence that Regular Maxwell House had a product differentiation advantage over other coffees. While it was and is the dominant brand in the HFNI, according to Mr. Graham, aside from some private label coffees, it did not sell at higher than competitive prices to the grocery trade (Tr. 10,570–71).[31] If by "product differentiation advantage" complaint counsel mean simply that it is a product which commands consumer loyalty, then Regular Maxwell House had no advantage over other branded coffees which, one must assume, also had a loyal following. If they did not, they could not remain viable competitors. **[83]**

(f) *Share-Price-Profit Analysis*

330. Dr. Mann conducted statistical tests that were designed to determine whether the share-price-profit relationship which he believes indicates market power is reflected in the relationship between the market shares, prices, and profits of Regular Maxwell House (Tr. 3595, 3608, 3698–99).

331. His study analyzed five different statistical relationships: the relationship between absolute share and profit (CX's 1104, 1110); the relationship between relative share and profit (CX's 1106, 1112); the relationship between absolute share and price (CX's 1105, 1111); the relationship between relative share and price (CX's 1108, 1114); and, the relationship between price and profit (CX's 1107, 1113).

332. Dr. Mann was satisfied, based upon correlation analyses (which measure the degree of association between two pieces of data) (Tr. 3545) that each of his five studies established a statistically significant[32] positive relationship between share, price and profit (Tr. 3596–99, 3603–07, 3609–12, 3614–18, 4021–24, 4035–36).

333. Since these correlations showed that Regular Maxwell House's

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[31] A General Foods document describes Regular Maxwell House as a brand "that exists to satisfy the coffee drinking needs of ground coffee users who want a consistently high quality and satisfying coffee beverage at a popular price" (CX 11Z–9; *see also* CX's 23H, 44J, 45Z–64).

[32] Evaluation of statistical significance is a process that reveals how likely it is that two variables are related to each other (Tr. 3548).

pricing behavior and profitability were influenced by absolute share and relative share, he concluded that "some of the profitability levels enjoyed by the Maxwell House brand were consistent with the presence of market power" (Tr. 3688). Dr. Greer also agreed that this analysis established the presence of market power (Tr. 11,582–83).

334. On the other hand, Dr. Elzinga warned that high economic profits are not necessarily explained by the presence of monopoly power. Other factors such as superior management or simple good luck may well account for such profits (Tr. 9821). Correlations such as those prepared by Dr. Mann thus do not necessarily explain Regular Maxwell House's profitability[33] or [84] lead to the conclusion that it possessed market or monopoly power in the HFNI. In fact, the findings immediately above, which are based on testimony by knowledgeable industry members, reveal that the Maxwell House Division had neither control over price in the HFNI nor the ability to exclude competition in that area, and I reject Dr. Mann's and Dr. Greer's conclusions for they are based on statistical analyses which do not reflect the actual state of the regular coffee market in the HFNI or in its sales districts.

(g) *Regular Maxwell House's Profitability*

(1) Professor Dearden's Calculations

335. Professor John Dearden of Harvard University, who is an accounting expert, calculated the profitability of General Foods' regular coffee brands by sales district (Tr. 29).

336. Professor Dearden followed two principles in his profitability calculations: A business segment must be charged with all costs that benefit that segment (Tr. 36–38, 106–07); and, a common denominator must be found that will allow a comparison of the calculation with the profitability of other businesses. The common denominator selected by Professor Dearden was ROFE, or "return on funds employed" (Tr. 36–38). [85]

337. ROFE's for General Foods' regular coffee products by sales district were calculated by assigning as much of the cost and revenue as possible directly to the sales district and allocating the remainder in the most equitable way possible (Tr. 214).

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[33] Historically, analysts have often jumped to unjustified conclusions by mistaking an observed correlation for a cause-effect relationship. A high sample correlation coefficient does not necessarily signify any causal relation between two variables (Bhattacharyya & Johnson, *Wiley Series in Profitability & Mathematical Statistics*, at 406–07, 1977).

It is not difficult by associating different pairs of variables to find a high degree of correlation among some of them. In such a situation, it is tempting to conclude that one variable causes the other to change—to assume automatically a cause-and-effect relationship (Mandel, *Statistics for Management*, at 37, University of Baltimore).

The fact that we find a relationship between two variables does not imply a cause-and-effect relationship (Salvatore & Berliner, *Statistics*, at 173).

338. General Foods routinely allocates and assigns costs to determine product line profitability (CX 1006; Tr. 144), and Professor Dearden testified that what he did—assigning revenues, costs, and funds employed to a geographic area—is no different than assigning them to a product (Tr. 21–23). Thus, his district profitability calculations, according to him, give "a fair picture of the profitability among sales districts" (Tr. 310).

339. On at least two occasions, General Foods prepared analyses similar to those of Professor Dearden. From 1971 to 1973, the Maxwell House Division prepared district profitability statements that reported a quarterly profit figure by brand for each sales district (CX 993A–W) and, in 1977, General Foods financial planning and analysis department prepared a "Max-Pax regionalization study" which calculated profitability quarterly on a sales district basis (CX 815K).

340. The Regular Maxwell House ROFE's calculated by Professor Dearden for the eastern sales districts ranged from about 30 to 70% pre-tax in fiscal 1971 and 1972. The ROFE's for the western sales districts were lower, and in some cases were negative (CX 1115A). The national profits for Regular Maxwell House, according to Professor Dearden's calculations, were 42.40% pre-tax in fiscal 1971 and 37.20% pre-tax in fiscal 1972 (CX 1386).

(2) Mr. Klein's Calculations

341. Mr. Donald Klein, director of financial planning and control for General Foods (Tr. 8217) testified that Professor Dearden improperly treated certain Maxwell House Division cost and investment data and misinterpreted other data, and he revised Professor Dearden's figures to present what he believes is a more accurate calculation of profitability (RX 1170; Tr. 8457–68).

342. In addition to selling coffee packaged for sale at retail, General Foods also has a separate military business which sells to military commissaries and other military outlets. The military business is handled by a separate **[86]** organization which has its own separate overhead expense, general and administrative expense and sales force (Tr. 8461, 8467).

343. Professor Dearden's calculations attributed certain grocery coffee expenses to the military sales business. Mr. Klein returned these grocery coffee expenses to the grocery coffee business, which has the effect of reducing the Dearden profit before tax figure for the grocery coffee business. This in turn reduces the ROFE profitability estimate (RX 1170A–H; Tr. 8468).

344. When General Foods decaffeinates coffee during the production of its decaffeinated coffee products, caffeine is produced as a by-product, and the processing and sale of this caffeine is treated by

General Foods as a separate business with its own separate profit and loss statement (Tr. 8418–19). In the ordinary course of its business, General Foods does not include profits from the sale of caffeine in its ground coffee profits (CX 991A–N; Tr. 8473).

345. Mr. Klein testified that the demand factors affecting the profitability of General Foods' caffeine business are unrelated to the ground coffee business. Caffeine is basically an industrial product and is not sold through the same channels as ground coffee (Tr. 8418–20).

346. General Foods claims that inclusion of caffeine profits and exclusion of the investment needed to produce these profits inflates sales district profitability and I agree with this argument (RPF 8–39); however, Professor Dearden assigned no caffeine profits to Regular Maxwell House, and Mr. Klein's adjustments do not affect profitability figures for this brand (Tr. 9030–31).

347. The Maxwell House Division self-manufactures about one half of the coffee cans used to package its regular coffee products. This results in a saving to the Division over the purchase price of the can and represents a unique saving as a result of packaging efficiency, and Mr. Klein does not believe that savings resulting from self-manufacture of cans belong in any computation of profitability for comparison with a profitability benchmark which does not reflect such packaging efficiencies (Tr. 8407).

348. The Division transfers these self-manufactured cans to itself at the prevailing market price and accounts for savings due to self-manufacture in a separate profit and loss statement (Tr. 8408). In the ordinary course of its business, the Division does not include can plant savings in its calculation of ground coffee profits (CX 991A–k; Tr. 8473). [87]

349. Professor Dearden added these savings to profit before taxes and included the investment in the can plant in his calculations (Tr. 8411). This, according to Mr. Klein, inflated General Foods' profits for purposes of comparability with other businesses (Tr. 8409), and his revision excludes can plant savings from profits and can plant investment from funds employed (RX 1170A–H; Tr. 8472).

350. Other revisions by Mr. Klein to Professor Dearden's calculations were use of an actual tax rate of 51% (rather than assumed rates of 48% or 52%) which, in some cases, decreased profitability (Tr. 8500–01); inclusion of interest expense, which increases profitability (Tr. 8413–17, 8500–01); adjustment of accounts receivable data to reflect actual accounting experience which in most cases reduces the ROFE estimate (Tr. 8503–07); revision of accounts payable data which increases the funds employed (Tr. 8527–28); inclusion of certain cash investment items overlooked by Professor Dearden which increases

investment (Tr. 8532–37); and, revision of fixed asset allocations (Tr. 8541).

351. The following chart compares Professor Dearden's calculations (CX 1115C) with Mr. Klein's (note, however, that Mr. Klein's calculation is for all of the Division's regular coffee) (RX 1171A):

	CX 1115C Regular Maxwell House Estimated Return	RX 1171A GF Total Regular Coffee Estimated Return
Boston	25.5%	15.7%
New York	18.6	10.4
Philadelphia	22.3	12.6
Syracuse	10.5	0.3
Youngstown	2.5	2.6
Charlotte	38.7	27.7
Atlanta	35.1	27.7
Detroit	13.1	12.2
Total Eastern Area	20.8	12.2

352. Mr. Klein also computed an "economic" as opposed to an "accounting" rate of return. Dr. Elzinga explained that accountants expense items which economists recognize as having a useful life beyond the period of expenditure (Tr. 9819). Items which an economist would amortize or depreciate to reflect their useful life are advertising, promotion and research and [88] development (Tr. 9580, 9819). Dr. Elzinga concluded that an amortization rate of 36.8% was appropriate for costing the advertising and promotion of the Maxwell House Division, and that this rate was supported in the economic literature (Tr. 9770–75, 9817–32). The following chart compares Professor Dearden's estimated Regular Maxwell House accounting return with the economic return for all of the Division's regular coffee as estimated by Mr. Klein:

	CX 1115C Regular Maxwell House Estimated Accounting Return	RX 1171B General Foods' Regular Coffee Estimated Economic Return
Boston	25.5%	9.0%
New York	18.6	6.8
Philadelphia	22.3	7.9
Syracuse	10.5	4.8
Youngstown	2.5	3.8
Charlotte	38.7	17.3
Atlanta	35.1	16.9
Detroit	13.1	7.8
Total Eastern Area	20.8	8.1

(3) Criticisms Of ROFE Calculations By Sales Districts

353. Dr. Roman Weil, a professor of accounting at the University of Chicago (Tr. 8018) may have been exaggerating somewhat, but I believe that he reflects the general attitude of the accounting profession about allocations:

> [T]he Dearden procedures carry out allocations and those allocations are meaningless. The reason that I use the word meaningless is that those are the very words that Professor Dearden uses in his own writings.
>
> The views that I hold about the meaningless—the general feeling I have about these allocations of costs that are not directly [89] attributable are widely held among accounting theorists, accounting writers, and one of the most noted writers on the subject of the meaningless of these allocations is John Dearden of Harvard University (Tr. 8045–46).

354. While General Foods has, on occasion, calculated district profitability, Mr. Klein stated that national financial data cannot be retroactively assigned to districts to arrive at an accurate determination of sales district profitability. For example, to determine profitability for a sales district, one would need to know which of General Foods' four coffee plants, each with differing costs of producing coffee, supplied coffee to that sales district (Tr. 8260–62).[34]

355. In response to a question by complaint counsel, Mr. Graham of Standard Brands stated:

> Q. And you considered the Standard Brands' own calculations of Chase & Sanborn profitability by sales district to be a good measurement tool and very useful to you, did you not?
>
> A. The concept was useful. The results weren't very good. . . .

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[34] Professor Dearden disagrees on this point, arguing that since green bean and packaging material costs represent nearly 96% of all variable manufacturing costs incurred at the coffee plants and are purchased centrally, the use of national costs is appropriate (Tr. 58–59).

> And somehow I just felt the way the costs had been accumulated, there was something very imprecise in the system. So, we quit using the system (Tr. 10,658–59).

356. Charles Clark, Comptroller of The Folger Coffee Co., testified that Folger's, in the ordinary course of its business, **[90]** does not compute profit data by geographic area because it is not meaningful:

> Q. Does the Folger Coffee Company usually compile information regarding its revenues, costs and profits on a less than total marketing area basis?
> A. No, we do not compile that information normally on a less than total U.S. basis.
> Q. Why is that, sir?
> A. We have not felt that it was meaningful in the operation of our business to do that (Tr. 3171).

(4) Comparison Of Regular Maxwell House's Profitability With The "Benchmark"

357. Dr. Mann testified that firms with market power have the ability to raise prices above cost and hold them there, and that high profits over a sustained period of time indicate that a firm has market power (Tr. 3577, 3630–31, 3991–93). To determine whether Regular Maxwell House enjoyed market power, Dr. Mann compared its sales district ROFE's with a "benchmark." An appropriate benchmark is one which approximates the competitive rate of return (Tr. 3621). Dr. Mann used two benchmarks, one based on the average rate of return for food and kindred products and the other on the average rate of return for all manufacturing, as reported by the FTC's Quarterly Financial Report (QFR). Each average was calculated for the period 1971–1977 (CX 1085B, D; Tr. 3619, 3622–27, 3627–29).

358. Dr. Mann used a seven year average because an average over that long a period of time establishes the ability of a firm to hold prices persistently above the competitive level, evidencing a firm's ability to prevent competitors from eroding those profits by expanding and undermining the price structure (Tr. 3630–31).

359. Dr. Mann multiplied the average by 1.5 to obtain the rate of return that he used in his market power analysis (Tr. 3629–31). He used the 1.5 multiplier because he believes **[91]** that studies of the relationship between profit and share suggest that firms that are expected to have monopoly power have profit rates about 1.5 times the benchmark, and because 1.5 is a conservative number that adjusts for any imprecision in the calculations (Tr. 3631, 3692, 4076). A rate of return greater than 1.5 times the QFR benchmark is, in his opinion, higher than a competitive rate of return (Tr. 3645).

360. The all manufacturing seven year average was 11.04% and the food and kindred products seven year average was 11.49%. One point

five times the average equals 16.56% for all manufacturing and 17.24% for food and kindred products (CX 1085; Tr. 3626–31).

361. Using the Dearden estimates, Regular Maxwell House ROFE's in the following eastern sales districts exceeded the food and kindred products 17.24% standard:

Sales District	Regular Maxwell House ROFE %
Atlanta	38.67
Boston	25.51
Charlotte	35.10
Jacksonville	20.50
Memphis	20.80
Philadelphia	22.25

(CX's 1085, 1115C).

362. Dr. Mann testified that the profitability figures in the Youngstown and Syracuse districts did not meet the average profitability standard of 1.5 times the QFR benchmark because of predatory pricing which he believes occurred in the middle of this period (Tr. 3700, 3705).

(5) Criticisms Of The QFR

363. Dr. Mann believes that the QFR average is conservative because it is biased upward by inclusion of monopolists which earn above average rates of return (Tr. 3639, 3692). On the other hand, General Foods argues that, conservative or not, the QFR is so flawed that it cannot be used as a benchmark.

364. Mr. R.T. McNamar was executive director of the FTC from 1973–1977. He was given responsibility for managing the development of the FTC's line of business reporting program and [92] in that role undertook an analysis of the QFR program (Tr. 9595–96).

365. Under QFR procedures, a reporting company is initially classified in the mining, manufacturing, wholesale trade or retail trade industry groupings based upon which of the above activities accounted for most of that firm's gross receipts. A corporation assigned to the manufacturing division is then further classified into two-digit Enterprise Standard Industrial Classification ("ESIC") groups, such as food and kindred products, based upon that two-digit ESIC group "which accounts for more gross receipts than any other two-digit Manufacturing Group" (RX 1182I). The QFR publication warns that this procedure results in entire large conglomerate companies being assigned to an industry group which accounts for only a small portion of that company's gross receipts:

It should be noted that these procedures may lead to a conglomerate corporation being assigned to an industry group from which only a small proportion of its receipts are obtained (RX 1182I).

366. Mr. McNamar believes the primary industry classification scheme not only distorts data by including operations of firms not engaged in that business, but also distorts data through introduction of items not at all related to the operations of a QFR industry classification. According to Mr. McNamar in a memorandum on the QFR which he sent to the director of the Bureau of Economics:

> To illustrate, a company's "primary industry" based on its gross receipts may be a relatively low capital intensive one. Yet, within the same company in filling out its QFR form other asset intensive industries cost structures are included in the "primary industry." These aggregated results are then combined with other similarly treated firms to become QFR data. Hence, the high asset structure of a "secondary industry" (line of business) is combined with the sales from a less capital intensive one. Obviously, the operating expenses, depreciation charges, etc., are inappropriately subtracted from the [93] primary industry's sales to derive net income before taxes.
>
> Clearly, the QFR's primary classification scheme violates sound accounting principles with no apparent justification precedent. More importantly, the reporting approach by design masks the operation of any one industry, and I would submit makes inter-industry comparisons meaningless (RX 1181H; Tr. 9616–19).

367. Mr. James Folsom, when deputy director of the FTC's Bureau of Economics, also cited several concerns about QFR data in a February 7, 1975 affidavit filed in *FTC* v. *American Standard.* On page 3 of his affidavit, Mr. Folsom stated:

> The QFR data are deficient in three major respects. First, the industry categories are too broad to be of maximum utility in analyzing individual industries. . . .
>
> Second, the QFR data are assembled by assigning all activity of a firm to that single industry which accounts for the plurality of its sales. This leads to a problem known as contamination. . . . (RX 1155C).

368. A report by the FTC Bureau of Economics staff on the justifications for the FTC LB Program also recognizes deficiencies in QFR:

> There are two serious problems with the QFR data which severely limit their usefulness. The industry groupings are excessively aggregated, and all of the operations of a company are assigned to a single industry (RX 1179S).

The report also stated:

> [Some] activities are included in each of the categories which should not be, and some activities which should be included are not. . . . [94]

> The magnitude of this problem can be illustrated by some results of a recent internal analysis. This analysis covered slightly more than 100 companies, with a total value of gross receipts of more than 250 billion dollars. For these companies approximately one-third of total gross receipts was from QFR categories other than the one to which they were assigned. In four of the 31 categories, from 30 to 39 percent of gross receipts belong in other categories; in two categories, the percent is between 40 and 49; in one category, the percent is between 50 and 59; and in other categories is between 60 and 69. As these data show, the distortions introduced in the QFR data by diversification are demonstrably both severe and pervasive.
>
> * * * * * * *
>
> And, given the magnitude of the distortion which [diversification] causes, extreme skepticism is called for in any of the various uses of industry data on sales, costs and profits (RX 1179S–W).

369. While complaint counsel argue that criticism of the QFR applies to its use to determine the profitability of specific product markets, and not to its use as a benchmark (CRF 4–13), Dr. Mann, when he was director of the FTC's Bureau of Economics, testified before a Congressional subcommittee that:

> Most major firms are so highly diversified that any particular 4-digit sic category accounts for so little of the company's business that it is very misleading to claim we are measuring industry profitability (RX 1275E). [95]

(6) General Foods' Benchmark

370. Given the above criticisms and other problems which General Foods sees in the QFR,[35] it offered a benchmark consisting of a sample of 25 firms with at least 50% of their sales in branded consumer grocery products (RX 8–123). The problem with this benchmark is that it is most likely more biased and contains more sampling error than QFR. First, the sample is very small, whereas QFR samples over 10,000 firms (RX 1182U; Tr. 3619).[36]

371. Furthermore, the benchmark's profit rate is probably biased upward because at least 18 of the 25 firms operate in one or more product markets with four firm concentration ratios ranging from 52% to 90% (Tr. 9206–14), where, presumably, profits are higher than in markets with less concentration. Thus, I do not believe that the alternative benchmark offers any more insight into the monopoly profits issue than does QFR.

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[35] QFR data is estimated and unaudited (RPF 8–96 to 8–99); it suffers from "significant discontinuities" (RPF 8–100 to 8–102); it includes bankrupt companies (RPF 8–108 to 8–109; and, it reports accounting rather than economic rates of return (RPF 8–110).

[36] Because of this Dr. Elzinga stated that sampling is not a problem with the QFR (Tr. 9840–41).

(7) Conclusion

372. I do not agree with Dr. Mann that the comparison of Regular Maxwell House's estimated profits in certain eastern sales districts with his QFR-based benchmark establishes that the brand enjoyed market or monopoly power in those districts.

373. I use the term "estimated profits" deliberately, for I do not believe that even Professor Dearden would argue that the figures which he calculated are anything other than estimates. They are, to be sure, estimates of a highly-respected expert and are entitled to serious consideration; however, they are based on an assumption which I cannot accept.

374. The assumption is that aggregated accounting data can be broken down so accurately that precise economic conclusions can be made about the profitability of one brand of regular coffee in one Maxwell House Division sales district. Furthermore, even if Professor Dearden's estimates are accepted **[96]** at face value, the possibility that the "excess" profits identified by Dr. Mann are due to something other than monopoly or market power has not been excluded. And, finally, the fact that QFR may have been used by economists as a benchmark in other cases or in articles analyzing industry power (CPF 11-258 to 11-266) does not mean that it must be accepted in this case. Enough problems with the QFR have been identified in this case to make me very wary of accepting it whole-heartedly as a benchmark here. In conclusion, I agree with Dr. Elzinga's summary of the proper use of QFR—*i.e.*, it may be used for insight, but using it to draw firm conclusions in this case is very risky:

> Where I would disagree with my friend Professor Mann, is that instead of taking the data for insight, he uses the data to drawn conclusions. And I have two reactions to that. One is that high profits relative to a QFR contaminated benchmark do not necessarily mean monopoly. Before I ascribed an antitrust violation to that situation I would want to be very certain that those high profits were not simply the result of a better run company.
>
> The second thing is, is that I've made an examination of the profitability of the Maxwell House Division,[37] and even on the basis of accounting data, this is no money machine. Its average rate of return approximates that of the average of all manufacturing (Tr. 10,493).
>
> Now, economists are always making judgment calls. It's one thing to make a judgment call when your numbers represent the phenomenon you are actually measuring. But here we are using a rubber yardstick with accounting data and consequently I think it is imprudent to take numbers that are as fuzzy as accounting numbers and from it draw the conclusion that **[97]** profits are too big and they have lasted too long, especially when your benchmark has some of the problems that I have already ascribed to it (Tr. 9846).

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[37] An apparent reference to Mr. Klein's two calculations of the profitability of all of the Division's regular coffee (Findings 351 and 352).

375. Mr. Keith B. Anderson, a staff economist called by complaint counsel, agreed with Dr. Elzinga:

> A. . . . One would not look at profit data alone. One would look at it in the context of an overall examination including conduct, structure and performance variables.
>
> Q. You would not conclude that monopoly power existed solely on the basis of comparisons with QFR data, is that correct, Mr. Anderson?
>
> A. I would not conclude that monopoly power existed solely on a comparison of a firm's performance, a firm's profitability to a benchmark from the QFR. I would look at the whole range of information available (Tr. 10,826).

376. The danger of relying solely on a profit-benchmark analysis is evident, for when one compares Professor Dearden's profitability estimates of General Foods' Yuban brand with Dr. Mann's benchmark, one comes to the conclusion that a brand with no more than a 3.5% market share in seven sales districts would be deemed to have market or monopoly power:

Ground Yuban FY 1971-FY 1977

	After Tax ROFE	Share Of Market
Charlotte	43.5%	1.0%
Atlanta	50.1	1.0
Jacksonville	41.1	0.5
Cincinnati	19.3	0.4
Chicago	19.9	0.3
Denver	33.7	0.9
Portland	18.8	3.5

(RX 1268). [98]

Dr. Elzinga properly concluded that these figures show that the uncritical acceptance of Dr. Mann's theory can lead to "some very bizarre, if not absurd, results" (Tr. 10,502–03).

377. Looking at all of the available evidence, I find that Regular Maxwell House did not possess, or come close to possessing, market or monopoly power either in the nation, the HFNI, or in the HFNI sales districts. I do not accept Dr. Mann's analysis of the brand's performance because his profit-benchmark theory can lead to the conclusion that a brand which clearly does not possess monopoly power could be found to have that power (Finding 376). Furthermore, even if Dr. Mann's theory provided some insight into this issue, the structure of the market, and the brand's performance in that market, show its lack of market power, for in none of the areas mentioned above did Regular Maxwell House have enough share to cause concern about, or to lead to the conclusion that it had, monopoly power (Tr. 9503–04, 11,963). Moreover, its market conduct indicates that

Regular Maxwell House did not control the price of regular coffee and could not exclude competition from any area—the nation, the HFNI, or the HFNI sales districts.

5. The Alleged Predatory Conduct

(a) *Introduction*

378. According to complaint counsel, General Foods' response to Folger's eastern expansion amounted to an attempt to monopolize the eastern regular coffee markets by (1) engaging in predatory pricing, that is, sustained pricing below average variable and average total cost; (2) using a "fighting brand"; and (3) attempting to impose an allocation of markets on a competing firm. They also claim that General Foods copied a Folger advertising campaign to impede its entry into the HFNI.

(b) *Proof Of Sales Below Cost*

(1) Complaint Counsel's Exhibits

379. Complaint counsel contend that Regular Maxwell House coffee was sold below average variable cost and average total cost as revealed on exhibits introduced by Mr. Ronald Rowe (CX's 954–57, 1389; Tr. 2249). At the time of his testimony, Mr. Rowe had been a staff accountant with the Federal Trade Commission for 19 years (Tr. 2237–38), and he has previously testified as an expert accountant. He has also been assigned to **[99]** cases involving issues of sales below cost and area price discrimination (Tr. 2239–43).

380. Mr. Rowe prepared exhibits showing revenues and costs per unit for Regular Maxwell House coffee on a quarterly average basis for the Cleveland market area for the period April 1971 through December 1974 (CX 954–55); for the Pittsburgh market area for the period from April 1972 through March 1975 (CX 956); and for the Syracuse sales district for the period from October 1973 through December 1976 (CX 957; Tr. 2250–52).

381. Mr. Rowe determined the method of calculating the figures appearing on CX 954 through CX 959, and he performed the calculations (Tr. 2252–53). He explained in detail his methods of calculating each of the revenue and cost figures appearing on CX 954 through CX 959, and described the specific sources of the data he used for each calculation (Tr. 2254–313).

382. The data Mr. Rowe used to make these calculations came from information that General Foods submitted in summary format or from underlying General Foods business records, with the exception of one line item on the Syracuse chart (CX 957). Mr. Rowe developed the figures on that line from data obtained from General Foods' adver-

tising agency (Tr. 2253). Mr. Rowe testified that, in his opinion, the accounting data shown on CX 954 through CX 959 are very reliable data, and that they accurately show the revenues and costs per unit for the respective geographic areas and time periods (Tr. 2313).

383. Regarding most of the information used by Mr. Rowe, a letter to complaint counsel from Mr. Robert Y. Fox, then assistant general counsel of General Foods, stated that the information had been organized "to show as closely as possible the actual, local, geographic cost data" (CX 436B; Tr. 2313–15). Mr. Rowe also considered reliable the information he received from General Foods after the date of Mr. Fox's letter. He considered this additional information reliable based on the deposition statements of Mr. Donald Klein, a General Foods' employee and financial consultant, that Mr. Klein had supervised the preparation of the information and that it was generated in a manner consistent with the information referenced in Mr. Fox's letter (Tr. 2315).

384. CX 954 and CX 955 show that General Foods' revenues for Regular Maxwell House in Cleveland were below total variable cost for four of the first 12 quarters following Folger's entry into Cleveland in October 1971 (Tr. 2322). Those quarters were the first quarter of 1972, and three of the four quarters of 1974 (Tr. 3712–13). On a yearly average basis, General Foods' revenues for Regular Maxwell House in Cleveland were $.168 below total variable cost per unit from October 1973 through September 1974 (CX 1389). **[100]**

385. CX 956 shows that General Foods' revenues for Regular Maxwell House in Pittsburgh were below total variable cost for seven of the eight quarters following Folger's entry into Pittsburgh (Tr. 2322). Starting with the June quarter of 1973, General Foods' revenues for Regular Maxwell House in Pittsburgh were below total variable cost for seven consecutive quarters (Tr. 3720). On a yearly average basis, revenues for Regular Maxwell House in Pittsburgh were below total variable cost by $.855 per unit from April 1973 through March 1974, and by $2.90 per unit from April 1974 through March 1975 (CX 1389). On a yearly average basis for the Youngstown sales district as a whole, General Foods' revenues for Regular Maxwell House were $.329 below total variable cost per unit from April 1973 through March 1974 (CX 1389).

386. CX 957 shows that General Foods' revenues for Regular Maxwell House coffee in the Syracuse sales district were below total variable cost in seven of nine consecutive quarters starting with the quarter of Folger's entry in October 1974 (Tr. 2323, 3724). On a yearly average basis, General Foods' revenues for Regular Maxwell House in the Syracuse sales district were below total variable cost by $.516 per

unit from October 1974 through September 1975, and by $.375 per unit from October 1975 through September 1976 (CX 1389).

387. If Mr. Rowe's calculations are accurate, Regular Maxwell House was sold below average variable cost for a total of 18 quarters or 54 months in the three areas. General Foods agrees that it sold below average total cost in these areas (RLA, p. 92).

388. General Foods parries Mr. Rowe's charts with charts prepared by Mr. Klein (RX 1137-42). However, these charts were not based on quarterly data and did not have separate information for Cleveland and Pittsburgh in the Youngstown sales district. General Foods also makes several objections to Mr. Rowe's data.

(2) General Foods' Objections To Complaint Counsel's Exhibits

389. There are three principal reasons why General Foods challenges Mr. Rowe's exhibits. First, in attempting to calculate the total costs for manufacturing the Regular Maxwell House product sold during a particular period, Mr. Rowe allegedly substituted an inventory accounting system that greatly inflated General Foods' actual costs. Second, in **[101]** classifying costs as fixed and variable,[38] several of Regular Maxwell House's fixed costs were treated as variable costs. And third, the data was presented in such a constricted and fragmented manner as to be an inaccurate representation of the business (RPF 9-16). These three objections will be discussed seriatim.

(aa) *The Inventory Accounting System Used By Mr. Rowe*

390. Cost of production is the cost required to produce a certain can of coffee during a given period and includes raw material costs, packaging material costs and labor costs (Tr. 8666–71). Cost of production is calculated for each Maxwell House Division plant (Tr. 8670). Cost of sales, on the other hand, reflects the cost of goods sold during a particular quarter and is a national average of the cost of production of the inventory on hand and current cost of production (Tr. 8666–71). General Foods uses cost of sales as a measurement of its costs (Tr. 8666).

391. Mr. Rowe employed cost of production in computing Regular Maxwell House's costs. When compared with cost of sales data, this tends to increase, or, as General Foods puts it, to "inflate the cost of goods sold during a particular period" (Tr. 8671; RPF 9–17). Since it uses cost of sales as a measurement of its cost (Tr. 8666), General Foods argues that Mr. Rowe should have used this data instead of cost of production figures.

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[38] Variable costs are those costs that increase or decrease with some relationship to output (Tr. 2316). Fixed costs are those costs that would be incurred by a firm if it were producing at the zero output level, *i.e.*, those costs that the firm incurs no matter what level of output it produces (Tr. 3707).

392. Complaint counsel reply that cost of production is the correct methodology for computing below cost sales because pricing decisions are made on the basis of current costs, rather than on the value of inventory, and they point to Mr. Klein's testimony that General Foods does making pricing decisions on this basis:

> The market prices for green coffee, which we have to pay cash for, on a daily basis, [102] increased by almost the same amount. So our net sales rate had to increase by the same amount to cover our higher cash cost in the business (Tr. 8806).

Mr. Hunter also testified that the normal practice in the industry is to price to recover the replacement cost of green beans regardless of the firm's accounting system (Tr. 3084).

393. The choice by the Maxwell House Division of an average inventory system should not affect an analysis whose purpose is to determine whether it was charging prices below contemporaneous costs. Thus, I agree with complaint counsel that cost of production is the fairest method of computing sales below cost because it is the only method that permits comparison of current costs and prices.

(bb) *The Determination Of Whether Certain Costs Are Fixed Or Variable*

394. There are differences between General Foods and complaint counsel over the treatment of advertising, promotional costs and warehousing.

(i) Consumer Coupons

395. General Foods claims that some consumer coupons are not variable costs. In support of this assertion, General Foods demonstrates that over a seven-year period, while the volume sold of General Foods total regular coffee and Maxwell House has been relatively stable, consumer promotion costs have fluctuated greatly (RX 1153A–B; Tr. 8626–35).

396. Many of Regular Maxwell House's consumer promotion offers are not run on a sales district basis, but instead on either a national or regional basis (Tr. 8652). Even though the volume of coffee sold in a particular sales district may increase or decrease, the costs for redeeming coupons remain relatively constant for these national and regional consumer promotions (Tr. 8651). A single commitment is made to run a national or multi-district consumer promotion, and it cannot be altered to exclude a particular sales district (Tr. 8648–49). Nor is it possible to cancel a consumer promotion once it is issued.

397. Complaint counsel, on the other hand, argue that consumer coupons are variable costs. The requirement for [103] payment on a

consumer coupon is the purchase of a can of coffee, and they argue that nothing more directly varies with volume than the one-to-one relationship between a coupon redemption and a sale (CRF 1-18).

398. General Foods concedes in its charts that some consumer coupons are variable costs. For example, all consumer coupons issued under separate sales district promotion sheets are treated as 100% variable. On the other hand, consumer coupons which are issued on a multi-sales district basis, are treated only as 50% variable (Tr. 12,148).

399. I believe such treatment is illogical, since for each multi-district coupon redeemed in a sales district there is still a one-to-one relationship with volume: for each coupon payment, a full sale is made, not half a sale. Thus, these coupons vary directly with volume. General Foods' position ignores the fact that when a coupon is released, whether for an individual sales district or on a multi-district basis, the full impact of that coupon is felt by competition in each area. For example, Paul de Lima, who only sells in Syracuse, would have to compete with a 50 cent Maxwell House coupon in Syracuse, regardless of whether or not th same value coupon were also distributed somewhere else.

400. Coupons are directly related to volume. For each coupon redeemed, a sale must be made. General Foods' proposal to exclude half of the value of multi-district coupons is thus without merit. Accepting its theory would exclude from consideration substantial variable costs that are incurred in a specific sales district.

(ii) Advertising

401. General Foods claims that some advertising is not a variable cost. Complaint counsel, on the other hand, argue that all advertising is a variable cost (CRF 1-23).

402. General Foods treats spot advertising as variable in its own computation of costs (RPF 9-72). The only real dispute is over the inclusion of network advertising as a variable cost in estimating costs at the sales district level.

403. General Foods' assertion that network advertising is a fixed cost is based upon the fact that national network advertising is not controllable on a sales district basis, and the fact that it does not run national advertising campaigns to stimulate volume in particular sales districts (Tr. 8654). [104]

404. The allocation of national advertising costs to prove predation in local markets troubles me somewhat, for the costs are controllable only at the national level. On the other hand, the effects of such advertising are apparent at the local level, for it certainly affects the sales of local competitors, just as does spot advertising, which General

Foods agrees is a variable cost (RPF 9-67). The ability of advertising to affect rival firms is the primary reason that Areeda and Turner maintain that advertising should be included as a variable cost in a predatory pricing analysis (III. P. Areeda & D. Turner, *Antitrust Law*, ¶ 721a, at 191 (1978) (Hereafter, *Antitrust Law*). Since network advertising has the same effect on rival firms as spot advertising, it should not be excluded from such an analysis.

(iii) Warehousing

405. Finally, General Foods argues that only the shipping and labor components of the warehousing cost are related to volume on an annual basis. Warehouse management costs, warehouse overhead costs and taxes and insurance charges related to the operation of warehouses do not vary on the basis of volume. Therefore, Mr. Klein and Dr. Elzinga classified only 50% of warehousing costs as variable (Tr. 8619-22). Complaint counsel argue that General Foods, in the ordinary course of business, assigns warehousing costs to individual products on the basis of volume (Tr. 8720), but it does appear that General Foods is correct in recognizing that certain components of warehousing costs are fixed and it seems fair to consider 50% of that cost as fixed. The effect of such changes on Mr. Rowe's calculation is, nevertheless, minimal because warehousing cost is a small percentage of total variable costs (*See* CX's 954-57).

(cc) *The Use Of Quarterly Data For Geographic Areas As Small As A Sales District Or Market Area*

406. General Foods maintains that to prove predatory pricing one must show at least one full year of sales that are below average variable cost. Mr. Klein testified that annual or long-term data is preferable to quarterly data because it captures the full business cycle and presents a more accurate accounting picture (Tr. 8672-74), and he claimed that this is especially true in the coffee industry because the volatile nature of green coffee prices can heavily influence the relative price and cost levels (Tr. 8673). Dr. Elzinga argued that, given the entry and exit characteristics of the regular coffee industry, annual data, at a minimum, is preferable to quarterly **[105]** data. Predatory conduct, according to him, is not likely to be successful in only a 90-day period (Tr. 9792-94).

407. Dr. Roman Weil, who was qualified as an expert in accounting, also testified that the most appropriate time period for measuring prices and costs in the coffee industry is "very likely longer than a year" (Tr. 8084). A longer period than a year is necessary in order to capture two important cycles in the coffee business. The first cycle relates to the fact that consumers consume less coffee in hot weather

than in cold. The second cycle relates to the growing cycle for coffee beans, which is reflected in the volatility of green coffee bean prices (Tr. 8084–85). For purposes of properly capturing the seasonal nature of consumer purchases, as well as for purposes of properly encompassing green coffee growing cycles, periods of at least one year and possibly up to seven years may be necessary (Tr. 8085).

408. Complaint counsel point out that this argument is inconsistent with General Foods' business practice, for its own contribution margin test (*infra*) was for a four to six-week period (RPF 9–115). General Foods also maintains quarterly business records and thus evaluates its business on a quarterly basis (Tr. 9044–48).

409. The reason that Dr. Elzinga chooses a long-run test for predation is that he believes that if General Foods were to sell below average variable cost for a quarter, the smaller firms could simply sit back and let General Foods "bathe in their red ink" (Tr. 9964). This appears to be unrealistic for the record reflects that once share is lost it is hard to regain (RPF 5–32; Tr. 1680, 2528–29).

410. I agree with the traditional view that predation consists of the sacrifice of short-run revenues to make larger rates of return in the long-run, and I do not accept General Foods' argument that predation can be measured only over a one-year period. For example, Areeda & Turner would not permit a monopolist to engage even in promotional pricing which, by definition, is short run, if it results in sales below marginal cost. III *Antitrust Law*, ¶ 716, at 177.

(dd) *Using Sales Districts And Market Areas To Measure Predation*

411. Dr. Elzinga testified that because of the superior staying power of Procter & Gamble and the ease with which competitors can ship their coffee throughout the United States, sales below cost in a particular sales district or marketing **[106]** area could not drive out Procter & Gamble, nor could Procter & Gamble and other competitors be kept out during the recoupment period. He believes, therefore, that the presentation of sales district price-cost data is not relevant to a predation analysis when the absence of shipment barriers and actual shipment patterns evidence a much larger geographic market (Tr. 9793–95). While I agree with Dr. Elzinga, I am assuming that the geographic market is no larger than a sales district.

(ee) *Other Objections By General Foods To Mr. Rowe's Data*

412. General Foods claims that Mr. Rowe used inaccurate data in assigning plant costs and in calculating coupon and advertising costs for he relied on planning documents which do not record which plants actually shipped to a certain district (CX 387; Tr. 2270–72, 5119–23) and that, in calculating coupon costs, he relied on projected cost data

submitted by General Foods rather than campaign analysis documents which give the final actual cost of a particular coupon promotion. Finally, in calculating spot advertising expenditures, it is claimed that Mr. Rowe relied on Broadcast Advertiser's Report data which is a poor estimate of actual costs.

413. Complaint counsel's answer to these objections is that Mr. Rowe used the best available data. One of the reasons Mr. Rowe considered his data accurate was a letter from Mr. Robert Y. Fox, then Assistant General Counsel of General Foods, which states that the information had been organized "to show as closely as possible the actual, local, geographic cost data" (CX 436B; Tr. 2313–15). General Foods claims that this letter actually informed Mr. Rowe that the data in volumes 15 and 16 were estimates, because they were recent and based on projections (CX 436C). However, General Foods ignores the next sentence in the letter, and a later sentence, that states that it was providing the accurate data in volume 19.

> . . . The deal rate information in volume 19 applicable to each quarter is therefore the data that should now be used.
>
> . . . The advertising rates in Volume 19 are therefore the ones that should now be used (CX 436C).

Mr. Rowe did use the data from Volume 19 (Compare CX 954 and CX 955 with CX 263 and CX 264 (the 19 in the upper corner stands for the volume number)). [107]

(3) General Foods' Exhibits

414. General Foods introduced its own charts, prepared by Mr. Klein, which analyzed whether it sold below cost (RX 1137–42). However, the time period analyzed was one year rather than the quarterly data of Mr. Rowe, and Mr. Klein analyzed costs in the Youngstown sales district rather than in the separate market areas of Cleveland and Pittsburgh. As did Mr. Rowe, he analyzed costs in the entire Syracuse sales district. As previously discussed, I believe that quarterly data is to be preferred over annual data for an average variable cost test (Finding 412), and since I am assuming for purposes of this analysis that complaint counsel have correctly delineated the relevant geographic markets, analysis of costs in the entire Youngstown sales district is not appropriate.

(4) Conclusion

415. I am generally satisfied with the broad implications of Mr. Rowe's cost analysis although General Foods does make some valid objections. For example, it is certainly to be expected that there would

be some problems with calculating sales district and market area profits and costs for a company which is national, just as there are when ROFE's are calculated (*supra*). Furthermore, Mr. Rowe's estimates would have been better if more accurate data for some costs had been available. Nevertheless, I do not believe that these problems are serious enough to totally invalidate Mr. Rowe's analysis of average variable and average total cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district. My conclusion finds support in General Foods' own documents which reveal that it did sell Regular Maxwell House below average variable cost in Pittsburgh and Cleveland.

416. Sales below cost occurred in these areas when trade deals on Regular Maxwell House equalled or exceeded Regular Maxwell House's "contribution margin." "Contribution margin" as it is used in General Foods' documents is defined in CX 1024 (CX 1024; Tr. 2335–36). The document states:

> Contribution margin is a measure used by General Foods of the variable profitability of a product or total business. It is calculated by subtracting variable sales deduction, distribution, and manufacturing costs from gross revenues as follows: [108]
>
> Gross Revenue
>
> Less: Cash Discount Expense
> Returns and Allowances
> Transportation Expense
> Warehousing Expense
> Raw Material Cost
> Packaging Material Cost
> Variable Manufacturing Labor
> Variable Manufacturing Expense
> Contribution Margin
>
> General Foods reporting formats identified contribution margin as the key measure of variable profitability from F'1971 through F'1974. Beginning with F'1975, General Foods reporting formats were revised with the term "volume contribution" replacing "contribution margin."
>
> The two terms are synonymous, however, and are calculated in the same manner (CX 1024).

417. Simply stated, "contribution margin" is net revenue minus variable costs of manufacturing and distribution (Tr. 7051). Mr. Laster explained further:

> Contribution margin is the amount of money that is left in a business after the variable [or] the direct costs have been absorbed, and that money can then either all go into profits, some of it can go into advertising, some of it can go into salaries. But it's basically what is left in the P&L after all direct costs have been absorbed (Tr. 7051–52).

418. General Foods' definition of contribution margin does not include reductions for trade deals, consumer promotions, and advertising (CX 1024; Tr. 7052, 8862). "Trade deals" includes performance offers, buying allowances and retailer coupons (Tr. 7054–55). If, in a given market area or sales district, General Foods' trade deal rate for Regular Maxwell House equalled its contribution margin for Regular Maxwell House, it would be selling that coffee below variable cost (Tr. 2336). It would be selling below variable cost by the amount of Regular Maxwell House's other variable costs—*i.e.*, consumer **[109]** promotions and media advertising combined (Tr. 2337). In fact, for the purpose of analyzing sales below cost in Syracuse and Youngstown, Mr. Klein classified all spot television expenditures, all trade deals, all direct consumer promotions, and half of the regional consumer promotions as variable costs (Tr. 9238). Thus, even by its own classification of costs, when General Foods' trade deals were at the contribution margin level, it was selling Regular Maxwell House below variable cost due to consumer promotions and expenditures on spot advertising.

419. General Foods' own documents show that in Pittsburgh and Cleveland, Regular Maxwell House's trade deals were greater than the amount of Regular Maxwell House's contribution margin. In that instance, Regular Maxwell House's revenues did not even cover the amount of its trade deals (CX 103A–I).

420. The "RMH Contingency Plan Re-Visited," dated November 6, 1973 (CX 103A–I), indicated that Regular Maxwell House's trade rate was above contribution margin at that time (CX 103E; Tr. 1576–79). The conclusions in the Contingency Plan were based on CX 103A–I that showed figures for Regular Maxwell House's CMLTD (contribution margin less trade deals) for the Pittsburgh market area and the Cleveland market area, which together make up the Youngstown sales district. The exhibit also shows Regular Maxwell House's CMLTD figures for individual pack sizes in the Pittsburgh and Youngstown market areas (CX 103I; Tr. 1578). Contribution margin less trade deals does not include reductions for consumer promotions and advertising expenditures (Tr. 8862).

421. The exhibit shows that in Pittsburgh, for the December quarter of fiscal 1974, contribution margin less trade deals for three pound Regular Maxwell House was estimated to be a negative 63.5 cents per unit and a negative $152,100 in total dollars (CX 103I). It shows that contribution margin less trade deals for all pack sizes of Regular Maxwell House in total in Pittsburgh for the December quarter of fiscal 1974 was estimated to be a negative 2.7 cents per unit and a negative $9,000 in total dollars (CX 103I; Tr. 1578–79).

422. CX 103 also states that in Cleveland "RMH trade spending is

currently above contribution margin on 3# (the 3 lb. size)" (CX 103E). The exhibit shows that in Cleveland, for the December quarter of fiscal 1974, contribution margin less trade deals for three pound Regular Maxwell House was estimated to be a negative 62.4 cents per unit and a negative $90,700 in total dollars (CX 103I). The estimated losses shown on CX 103I were based upon contribution margins supplied to the Maxwell House Division from the comptroller of the Maxwell House Division. The data was internally generated (CX 103I; Tr. 1579).

423. Thus, while there are some problems with Mr. Rowe's calculations, it is quite clear from its own documents and [110] Mr. Rowe's analyses that General Foods did price below average variable cost in the Pittsburgh and Cleveland market areas and the Syracuse sales district during a substantial period of time in the early 1970's.

(c) *General Foods' Use Of The Horizon Brand*

424. General Foods' Horizon Brand regular coffee was first test marketed in Washington, D.C. in the 1960's; it was later withdrawn (Tr. 1592-2099, 5791–92).

425. The next use of Horizon coffee was in General Foods' "Red Can offensive" whose purpose was to introduce that brand at the same time Folger entered into areas of the HFNI (CX's 112B, 115B; Tr. 1420). The areas chosen were Wilkes-Barre and Albany (CX's 521D, 534A; Tr. 1591–93, 2763, 5792).

426. General Foods never intended to use the Horizon brand in its second incarnation as anything other than a "fighting brand"—*i.e.*, a brand that is aimed at a specific competitor to disrupt its marketing efforts (Tr. 2849–51)

427. This conclusion is inevitable given statements in General Foods documents outlining the reasons for the use of Horizon[39] and the similarity between the Folger can and the Horizon can which was introduced into Wilkes-Barre and Albany (*Compare* CX 818, which is the Horizon can used in the Washington, D.C. test *with* CX 819, used during Folger's entry, and the Folger can, CX 820). Mr. Oliver Trone, a former General Foods employee, testified that General Foods decided to [111] introduce Horizon into the marketplace at the same time as Folger's with a can that "was about as close to them as our lawyers would allow us to go" (Tr. 1420).

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[39] A chart in "RC Business Proposition," February 8, 1973, calculates the financial impact of using Horizon in Folger's test markets. The chart shows the impact on the profit before tax for the ground category of the Maxwell House Division. By using Horizon, the document concludes that the ongoing profit for the Ground Category with the Horizon effort would be $21.1 million, whereas, without Horizon, the ongoing profit would be only $15.9 million (CX 114S). Other statements in this document, although arguably discussing a long-term development program for Horizon, reveal that the primary purpose of the Horizon marketing effort was to impede Folger's entry into the HFNI (CX 114C, 114F, 114U). This purpose is explicitly stated in CX 107B: "The introduction of Horizon would severely hamper Folger's introduction in our HFNI area—It can extend Folger's payback from three to ten years."

(d) *General Foods' Western Retaliation*

428. At the time of Folger's expansion into the HFNI, Kansas City and Dallas were among its key western areas because they were high in volume, share, and profitability (Tr. 1399). Kansas City was Folger's hometown; it had a high market share there (55%–60%), and it contributed approximately 20% of Folger's national profits (CX 170C).

429. General Foods decided to step up its marketing efforts in these cities "to retaliate in the West on a one-for-one basis" as Folger expanded into the HFNI (CX 14C; Tr. 1399–1400). The purpose of this retaliation was disclosed by Mr. Bert Einloth, at the time the group product manager for Regular Maxwell House, in a 1973 memorandum:

> In addition RMH has initiated high-level marketing efforts in two major Folger markets, Kansas City/Dallas, intended to drain considerable funds from Folger which could be used in their new markets (CX 725A).

"New markets" as used in this sentence referred to current and future introductory markets in the east where Folger did not yet have distribution (Tr. 1584). Mr. William Philips, currently chairman of Ogilvy & Mather, colorfully characterized the retaliation in Dallas as "the same as bombing Hanoi" and viewed the increased marketing expenditures in Kansas City as "generally the same" (Tr. 1964–65).

430. The western retaliation was designed to cost Folger money—hopefully as much as $1 million per year in each western area where General Foods stepped up its marketing efforts (CX's 76C, 77B, 97K, 170C). While increasing its own market share in the west would have been welcome, to General Foods this was only a secondary objective of the western retaliation (CX's 17P, 19G, 76G).

(e) *General Foods' "Cora" Campaign*

431. Mr. Morgan Hunter, for four years Folger's general manager (Tr. 2707), testified that it had used a spokesperson named "Mrs. Olson" for a long time in the west and that Folger [112] had enjoyed consistent significant share growth for a number of years dating from the time that the "Mrs. Olson" advertising was put on the air (Tr. 3017).

432. Folger had proven and effective advertising copy in the "Mrs. Olson" campaign and Folger continued to use it when it entered the Cleveland market area (Tr. 3059–60).

433. The Maxwell House Division's "Cora" advertising campaign, instituted in July 1972 (CX 463Z125), was considered by Mr. Hunter, with some justification, to be a direct copy of Folger's "Mrs. Olson"

campaign. The campaigns were similar in the development of a character and the dialogue that took place between the young couple and the older woman, Mrs. Olson or Cora. Both involved the idea of the young housewife who cannot make a good cup of coffee, the husband complaining about it, and Mrs. Olson or Cora telling her what to do about it, thus solving the problem (Tr. 2760).

434. The "Cora" campaign was designed to appropriate for Regular Maxwell House the "slice-of-life" problem-solving approach of the "Mrs. Olson" campaign prior to Folger's entry and to make "Mrs. Olson" look like a "second rate" imitation when she arrived (CX's 1G; 468F). This would, if successful undermine the effectiveness of the "Mrs. Olson" campaign (CX's 88L, 171C).

435. The "Cora" commercial began running in 1972, shortly after Folger entered Cleveland (Tr. 5533, 5535, 5557, 5560–61).

(f) *Conclusion*

436. Although General Foods' western retaliation coincided with Folger's eastern expansion, I find nothing inherently anticompetitive in it. It was, to be sure, a signal to Folger that it might have to fight a battle for market share in both the east and west, but it seems to me perfectly legitimate for General Foods to defend its national market share by trying to increase its market share in the west while discouraging Folger's expansion plans. Furthermore, Folger's entry into the HFNI can be viewed as having the same purpose as the Division's western retaliation—to put pressure on the Division in the HFNI so it would concentrate less on its western efforts (Finding 226). Thus, I believe the western retaliation was a legitimate business endeavor, just as was Folger's entry into the HFNI.

437. The "Cora" campaign was also a perfectly reasonable reaction to Folger's eastern expansion. The fact that it copied some of the features of Folger's "Mrs. Olson" advertisement does [113] not mean that it was an anticompetitive act. The antitrust laws do not require a company faced with increased competition to accept only non-imitative advertising ideas from its ad agencies.

438. The Horizon campaign in Syracuse was a different matter: Horizon was not adopted because General Foods believed that it could be made into a successful brand. Its sole function was to blunt Folger's Syracuse entry by imitating its packaging. However, the introduction of Horizon and the Maxwell House Division's sales below total and average variable cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district occurred in areas which are not relevant geographic markets; complaint counsel have, therefore failed to prove that these acts occurred in an economically meaningful area.

439. The relevant geographic market in which these practices oc-

curred is nationwide. Considering Regular Maxwell House's market share in that area at the time of Folger's eastern expansion, even complaint counsel would agree that it did not possess or come close to possessing market monopoly power.

440. None of the prerequisites for predation existed in the relevant geographic market. Regular Maxwell House was not sold below total or average variable cost in this area, and it did not possess market or monopoly power in this area; thus, even if it had been sold below cost in this area, its prices could not have been raised later to recoup the Division's losses. This is true even if the sales districts are considered to be relevant geographic markets, for new entrants would have been attracted into these areas (Tr. 9540, 9544–50, 11,963–64). In short, General Foods did not engage in predatory conduct through its Maxwell House Division in the relevant geographic market.

J. *The Robinson-Patman Charge*

1. Introduction

441. Complaint counsel claim that the lowest prices "charged to retail customers" (CPF 12–4) by the Maxwell House Division differed between so-called "predatory" areas (Cleveland, Pittsburgh, Syracuse, Kansas City, and Dallas) and "comparison" areas.

2. The Robinson-Patman Price

442. The lowest price charged to retail customers is defined by complaint counsel as "list price less trade deals. Trade deals are made up of three basic elements: buying allowances, performance deals, and retailer coupons" (CPF 12–1). [114]

443. Complaint counsel claim support for their definition of price in a statement by Mr. Rowe that it is "acceptable to an accountant" (Tr. 2372), in statements by industry members that buying allowances, performance deals, and retailer coupons are "trade deals" (Tr. 8863–64), and in the fact that "dead net" price is defined by some industry members as list price less buying allowances, performance allowances, and retailer coupons (Tr. 2011, 2508–09, 2749–50, 2766, 6228–29).

444. General Foods does not disagree with complaint counsel's definition of dead net price, but it argues—correctly I believe—that this price does not equal the price which it charges its customers, or which its customers pay General Foods (RPF 10–10).

445. For example, Mr. Hunter defined dead net as "the lowest price that the trade could sell that item and not lose any money on it" (Tr. 2749), not the price that Folger charged its customers. Mr. Zurcher referred to dead net as a term used in sales presentations to the trade

to show his customers what they could feature to the consumer (Tr. 6228–29)—again, not the price which the Maxwell House Division charges its customers. Mr. Salesman referred to "dead net to the consumer"—not to General Foods' customers—as reflecting buying and performance allowances and RECU's (Tr. 5941), and Mr. MacDonald denied that dead net "aligns itself with the price we are charging" (Tr. 7133–34; see also Tr. 11, 887).

446. Despite the statements described above, there may be some industry members who believe that performance allowances or retailer coupons reduce the price charged by the Maxwell House Division to its customers, but their opinion does not comport with the way price has been defined by many of those who have been forced to grapple with the complexities of the Robinson-Patman Act.[40]

(a) *RECU's*

447. Although complaint counsel argue in the section of their findings devoted to the definition of price that "coupons"—both RECU's and consumer coupons—are price reductions "given by General Foods" (CPF 3–190 to 3–192), they claim that only RECU's (along with buying allowances and performance [115] offers) should be deducted from list price to arrive at the Robinson-Patman price.

448. The reason for the difference in treatment is obvious: it is literally impossible for Robinson-Patman purposes to conceive of a coupon which is packed in every can of coffee or featured in every edition of a newspaper, which involves no retailer in its preparation or distribution, and which identifies no particular retailer as a price reduction "to" the retailer. It clearly is not: it is simply a way in which a consumer may reduce his purchase price if he redeems the coupon at a retail store. In this case, the retailer serves merely as a convenient way in which the discount to the consumer is passed on. The redemption of the coupon by the retailer quite simply does not affect the price he pays to the Maxwell House Division or the price which the Division charges him,[41] for he receives from the Division only the amount which he previously gave to his customer (plus a handling charge). From the point of view of the retailer, the transaction is a wash.

449. The only difference between a RECU and a consumer coupon is that particular retailers arrange the publication of the former, and identify themselves as the place where the coupon may be redeemed. The effect from the point of view of the consumer and the retailer is

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[40] Complaint counsel recognize that the definition of the Robinson-Patman price "is ultimately a legal conclusion. The perceptions of industry witnesses as to what constitutes price cannot be determinative" (CPF 12–5).

[41] Of course, as I find above, a redeemed coupon does reduce the Division's revenue, but "revenue received" or "mill net" is not a Robinson-Patman price.

identical, and neither coupon effects a reduction in the price that retailers or wholesalers pay to the Division for their coffee.

450. Theodore Engel, a vice president of The Kroger Co., a large retail chain, stated that neither kind of coupon reduces his price:

> Q. Mr. Engel, why haven't you included the retailer coupon in your definition of price?
>
> A. Because that's all passed on to the consumer.
>
> * * * * * * *
>
> Q. So the store is really just a conduit for the coupon? [116]
>
> A. Right (Tr. 1656–57).

During surrebuttal testimony, the point was reiterated:

> Q. Mr. Engel in your explanation of how you go about determining the price that you pay to Regular Maxwell House and other coffee roasters, you did not mention retailer coupons or manufacturer's in-ad coupons as being a deduction in determining that price. Why is that, sir?
>
> A. Well, that is basically a transaction between the vendor and the customer. I am a conduit for that. I transfer the funds, but that is the sum and substance of what happens (Tr. 12,083–84).
>
> Q. So then you don't consider any coupon as a part of the price that you pay to General Foods?
>
> A. That I pay, no, sir (Tr. 12,085).

451. Roger Metzger, head buyer for S.M. Flickinger & Co., a major wholesaler in the Buffalo area, testified that RECU's are not reductions in the price that a wholesaler pays for coffee:

> Q. So then there is no reflection of a RECU or other coupon in the price that you pay to Maxwell House Division?
>
> A. No. As a wholesaler we're not really—in our pricing—involved in that.
>
> * * * * * * *
>
> Q. So [do] you consider any type of coupon whatsoever as effecting a reduction in the price that you pay General Foods?
>
> A. No, we don't (Tr. 11,864–65). [117]

452. Louis Epstein, president of Golden Dawn Foods, Inc., a major wholesaler in the Cleveland-Pittsburgh area, confirmed that coupons are not considered by him, as a customer of General Foods, as effecting a reduction in the price paid to General Foods. He considered RECU's as:

> . . . a device for lowering the effective price that the consumer pays, but after a sale is over in which a coupon is used, our inventory is valued at the list less the performance and the advertising allowances.

The coupon is all over. So we don't—for that reason—consider it a reduction in the value of our inventory or in the price we paid for it (Tr. 12,166).

453. Allen Toy of Hills Bros. explained the manner in which retailer coupons are used:

> A. She would clip out the coupon, take it to her store, and purchase coffee and at the checkout counter she would be reimbursed for either the amount of the coupon or she would receive the coffee at whatever the reduced price is in the coupon.
>
> * * * * * *
>
> A. The retailer would then give it back to the manufacturer who offered the allowance and be reimbursed for the coupon (Tr. 2010).

454. Mr. Toy testified further that it is the industry practice for manufacturers to reimburse retailers only for coupons properly redeemed and that both RECU's and consumer coupons are redeemed in the same manner:

> JUDGE PARKER: Does General Foods pay the dealer money for every [118] dealer coupon he puts in his ad or is it just on the ones redeemed—returned to you?
>
> * * * * * *
>
> THE WITNESS: [That] is the industry practice, yes, sir.
>
> JUDGE PARKER: So, in that sense, it is the same as a consumer coupon, or is it? In other words, you only pay for the ones actually turned in by some consumer?
>
> THE WITNESS: Yes, that is the practice (Tr. 2014-15).

455. When asked what effect a consumer coupon had on the price paid for coffee by the consumer, Mr. Toy answered:

> The net result would be that it would enable the consumer to buy coffee at a discount from the regular price (Tr. 2015).

And, in a follow-up exchange with me, Mr. Toy responded to this question:

> JUDGE PARKER: What about dealer coupons, same thing, same result?
>
> THE WITNESS: Yes. Same result for the consumer (Tr. 2015).

456. While the fact that retail grocers may not participate in RECU's does not, in my opinion, affect the definition of "economic price,"[42] it does indicate that RECU's are not a reduction in price to them, and there is evidence that some [119] wholesalers and retailers do not always use them. Mr. Epstein of Golden Dawn Foods explained that:

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[42] For, as I find above, to the extent that RECU's are used by retailers and redeemed by them, they affect the Maxwell House Division's net revenue.

> . . . we try to balance our advertising program to include items that the consumer would want on a periodic basis and if, for example, there is a flood of coupons on a particular commodity category, we would decline to use them all because of these not being a balanced program (Tr. 12,168).

457. Mr. Engel recalled that Kroger did not participate in all RECU promotions offered by the Maxwell House Division in Cleveland and Pittsburgh following Procter & Gamble's introduction. In fact, Kroger rarely used the one pound RECU's offered on Regular Maxwell House in Pittsburgh (Tr. 12,084).

458. Mr. Metzger also testified that the Buffalo area retailers serviced by Flickingers do not use all of the retailer coupons offered:

> . . . there are many offerings, some of them they use, some of them they don't have room for. There is really more than they can use. And it's a process of looking for the best that they can offer to get the—to attract that customer into our store each week (Tr. 11,870).

459. Mr. Keller pointed out that all customers in the Division's southern region, such as Winn Dixie and Colonial stores, do not use every RECU offered them and generally indicated that:

> . . . quite a few customers don't take advantage of RECU's at all. They don't participate in them, don't want them, don't like them for any number of reasons: too messy, too much work, too much trouble (Tr. 6616).

460. John Mann described an "extensive list" of customers who did not participate in the Division's RECU offers (Tr. 6516), and Mr. Salesman agreed that some customers do not participate in RECU's (Tr. 5941). [120]

461. The refusal of retailers to eagerly embrace RECU's at all times reveals that from the point of view of the retailer, the RECU's are not price reductions to them. This, and the indisputable fact that redemption of the coupon results in no reduction in the price retailers pay requires the inevitable conclusion that RECU's should not be deducted from the Maxwell House Division's net price to arrive at the Robinson-Patman price.

(b) *Performance Allowances*

462. General Foods agrees that while RECU's do not put any money in the retailer's pocket, both non-performance and performance allowances do (RPF 10–54),[43] and complaint counsel argue that since the amount of money received by the retailer in performance allow-

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[43] General Foods agrees that buying allowances, for which no performance is required, are price reductions (RPF 10–53).

ances from the Maxwell House Division far exceeds the cost of performance, performance allowances are really price reductions.

463. The Maxwell House Division performance allowances permit unlimited purchases regardless of the level of performance, for the offers provide that if the retailer performs, he will receive an allowance of a certain amount per unit on all the coffee he buys during the offer period. There is no maximum limit on the volume the retailer can buy and the amount of the discount he can receive. (CX 1148; Tr. 5846, 6003–08, 6016–18, 5635–36, 6542–45, 11,888). On most performance offers, the retailer only has to perform once to get credit for the allowance on all the volume purchased during the offer period (CX 1148; Tr. 6003–04, 6542–45, 11,899, 12,182).

464. Although there is no direct evidence as to the difference between the amount of performance allowance received by retailers and the cost of performance, it is unquestionably large in most cases, for the Division's offers do not specify the size of the advertisement the grocer has to run; for example, a retailer can run one very small advertisement, similar to the small print used in obituary columns, and still collect the allowance on all the volume purchased (CX 1148; Tr. 6005).

465. The value of performance allowances to retailers is obvious, and the rate of acceptance of such deals is very high—[121] around 90% (Tr. 2391, 2393, 7494). Dr. Greer testified that the rate of acceptance of performance allowances indicates that they clearly are price reductions (Tr. 11,419-21), but other matters—both factual and legal —must be considered before a decision on the status of performance offers can be given.

466. The most important matter is the intent of the offeror and the recipient. If neither the Maxwell House Division nor the retailer believe that performance is a real condition of the offer, then it can be said with confidence that the performance offer is simply a disguised price reduction.

467. That is not the case here, for the Division insists upon performance, minimal though it may be.[44] For example, Mr. Engel testified:

> Q. Why do you always anticipate that you're going to perform on a performance offer?
> A. One reason is to assure payment. Some we default and pay the vendor back (Tr. 1653).

Mr. Engel also stated during later testimony:

> Q. What happens, Mr. Engel, if you don't perform?
> A. We refund the money to the vendor.

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[44] The word "minimal" refers to the cost incurred by the retailer, but I also recognize that the benefit received by the Division may well be much greater because of the exposure given to its coffee by retailer advertisements.

Q. And does General Foods check up on your performance?

A. Yes sir.

Q. Could you say [that] General Foods checks up more or less than other grocery product manufacturers? [122]

A. General Foods and Procter & Gamble are the most diligent in making sure that we perform per their contracts (Tr. 12,080).

468. Mr. Metzger and Mr. Epstein, both wholesalers, explained the manner in which they pass through performance offers to their retail customers and police performance by such retailers jointly with General Foods:

Q. Then what happens, Mr. Metzger, if a retailer does not perform in accordance with the requirements of the offer? Does he get the allowance anyway?

A. He would get the allowance initially, but at the point where the performance was not produced, we would bill him back for the cases that we sold him (Tr. 11,867).

469. After Mr. Metzger confirmed that Flickinger's had indeed billed back its retail customers for failure to perform, he described the procedure for determining performance:

Q. Is Flickinger's responsible for determining whether or not the performance has been produced?

A. We jointly with the manufacturer determine the performance (Tr. 11,867).

When asked whether the allowances under performance offers were passd on to the retail stores serviced by Golden Dawn, Mr. Epstein answered:

We do. . . . It's the nature of a voluntary group that we act as an agent for all of our stores. We see to it that they perform through advertising groups and in doing that, we pass along to them, at our billing price, all of the performance allowances up front (Tr. 12,164). [123]

470. In testimony which followed, Mr. Epstein described the policing or checking up done by General Foods to determine whether the stores served by his firm were performing in a manner consistent with the terms of performance offers and, after explaining that all those retail stores did not participate in all Regular Maxwell House performance offers, he concluded:

Q. And when you do receive the performance allowance, it's because you have decided that performance will take place?

A. That's correct (Tr. 12,167).

471. Mr. Keller of the Maxwell House Division explained the procedures followed and emphasized that if the customer fails to match the

specifications of a performance deal, "then we don't pay . . ." (Tr. 6605).

> . . . we do police all our offers to satisfy ourselves that they have occurred. The policing is done in several ways. One that I mentioned earlier was we have a retail sales organization, 120 people out there that watch and monitor every ad that occurs. . . . (Tr. 6604)

472. Mr. Keller continued, ". . . every time a customer performs, he has a responsibility of filling out a 5812 and signing a certification that he has performed. To that 5812 certification, he attaches his proof of performance that identifies this as proof of performance. He verifies that. . . . So we have that piece of document, as well as our own retail follow-up to make sure that our customers are performing . . ." (Tr. 6605).

473. Mr. Mann also described the manner in which the Division insured compliance with the performance requirements specified in its offers (Tr. 6504–6505). Mr. Mann explained that a customer who deducted performance offers before performing was billed back if the required performance was not subsequently provided:

> Q. And does the performance of the particular customer also follow the [124] requirements that are specified in the deal bulletin?
>
> A. If they don't they don't get paid. So yes, they must perform according to the specifications as outlined on the deal bulletin and comply with them in all of their stores, either by virtue of advertising or displaying, in order to receive the trade deal in effect by virtue of the deal.
>
> Q. Now in some instances you indicated that the allowance is taken off the invoice.
>
> A. That's correct.
>
> Q. In that case, supposing that the customer does not complete a 5812 and furnished the required proof of performance; what happens then?
>
> A. We bill the customer back. . . . (Tr. 6514)

474. Complaint counsel concede that performance allowances require "some performance" (CPF 3–254) but argue, as does Dr. Greer, that: "A price reduction when associated with some performance on the part of the buyer is still a price reduction" (Tr. 11,412). While I respect Dr. Greer's economic credentials, he is not an expert on Robinson-Patman law. When its case law is analyzed (*infra*), I come to the conclusion that the Division's performance allowances are not discounts from price, but are advertising allowances which, along with RECU's, are cognizable only under Section 2(d), not Section 2(a).

475. Since complaint counsel's price discrimination claim is based upon treatment of RECU's and performance allowances as deductions from list price, their "price discrimination" charts (CX's 924–953) do not establish that General Foods' Maxwell House Division charged

different prices for its coffee in different areas of the country. Therefore, the Robinson-Patman Act count of the complaint will be dismissed.

3. General Foods' Meeting Competition Defense

(a) *General Foods' Intent*

476. Although I will dismiss the Robinson-Patman count because complaint counsel have failed to prove that the Maxwell [125] House Division sold regular coffee to its customers at different prices, the parties are entitled to my views on General Foods' meeting competition defense.

477. Several General Foods employees and customers testified about its general response to Folger's entry into those sales districts where the Maxwell House Division allegedly sold at lower prices than in other sales districts.

478. Mr. Bohn and Mr. Laster testified that General Foods' policy was to meet Folger's offers but not to sell below General Foods' definition of cost in Cleveland, Pittsburgh and Syracuse (Tr. 4516, 4535, 6970, 6975). The basic principle was not to aggress:

> Q. Now, you have also said, Mr. Laster, that another principle that was laid down was the principle not to aggress. Would you state for us what the factual content was of the principle not to aggress?
>
> A. The factual content was that our policy prohibited the organization from leading in any element of the marketing mix in the Cleveland market (Tr. 6972).[45]

479. Mr. Epstein, president of Golden Dawn Foods of Sharon, Pennsylvania, recalled the entry of Folger's into Cleveland:

> . . . when Folger entered the market, they attempted to meet the lowest tier of competition which at the time was Hills Bros. Hills Bros. deal rates were the best in the industry at the time and [at the time of] the Cleveland introduction, Folger being under a consent [126] decree, was careful only to meet competition and the lower competition at that time was Hills Bros., as I remember.
>
> Q. How do you know Procter & Gamble was operating in a fashion which enabled them only to meet the highest deal rates offered by any competitors?
>
> A. I discussed that with their sales representative at the time (Tr. 12,168–69).

480. Mr. Epstein testified further that Regular Maxwell House responded to the "heating up of competition," and Folger's increased rates, by meeting the competition (Tr. 12,169, 12,178).

481. Mr. Lloyd Nelson, the Maxwell House Division's national sales

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[45] That is,

Not to have higher trade deals than Procter & Gamble. And the same for consumer promotions and advertising (Tr. 6973).

manager, testified that exceeding Folger's trade rates "was an absolute no-no" (Tr. 5765) and that:

> As I mentioned earlier, we would never exceed the competitive rate in the marketplace. Number two, we had to have what we call hard data which was an absolute clear-cut confirmation of the competitive rate. Three, we couldn't sell below cost and I guess those are kind of the three guidelines that the sales organization was operating under (Tr. 5769).

482. Mr. Engel, an executive of the Kroger Company, and a customer of both General Foods and Procter & Gamble at the time of Folger's entries into the Cleveland and Pittsburgh areas, testified that the introduction of Folger's into both areas raised the value of buying allowances, performance offers and RECUs offered by coffee manufacturers and that Folgers' initiated the escalation of these promotional offerings. He further recalled that, in Cleveland, Regular Maxwell House made no initial response to Folger's but later on in year one, met Folger's promotional activity (Tr. 12,076–77).

483. Mr. Epstein recalled that, when Folger entered Pittsburgh, Regular Maxwell House matched Folger's escalation of trade deals (Tr. 12,170) and Mr. Nelson testified that in Philadelphia and Pittsburgh the Division attempted to meet Folger's promotional programs: [127]

> . . . in the Pittsburgh area we met them in what I would call across the board on trade deal, consumer promotions, advertising. In Philadelphia, if my memory is correct, we did not meet them on the trade deal line, again for some of the reasons that we talked about earlier, relative to trade flow (Tr. 5771).

484. Mr. Zurcher testified that Regular Maxwell House employed a "following" posture in arriving at a matching of Folger's dead nets in Pittsburgh:

> So we adopted a following posture, again very similar to which we eventually got into in Cleveland where through those sources I described, I could confirm and reported neither and, of course, I had to wait until I get approval back, and then we would match their dead nets (Tr. 6289).

485. At first, the Maxwell House Division decided not to match Folger's trade deals in Syracuse (Tr. 5785–86). According to Mr. Salesman, because of the Division's response (a trade rate plus RECU as compared to Folger's straight trade rate promotion (Tr. 5952)):

> We were at a significant disadvantage because we were dead netting to the consumer. We were not dead netting to the trade. In other words, our buying allowances and performance offer was not as heavy, not as high as Folger's (Tr. 5954).

486. Later, Regular Maxwell House matched Folger's trade rates (Tr. 5956); however, Mr. Salesman stated that he still had to ascertain Folger's rate before he responded:

> As I said earlier, we ran a lag strategy. We followed. I could not initiate an offer, nor was an offer [128] initiated until we verified what the Folger offering was in the marketplace with hard copy of what that offering was (Tr. 5957).

(b) *Mr. MacDonald's Charts*

487. In addition to the testimony discussed above, General Foods presented two charts prepared by Mr. MacDonald (RX's 1207 and 1292) which attempt to reconstruct his employer's response to Folger in Cleveland, Pittsburgh and Syracuse, on one, two and three pound coffee for approximately a year after Folger's entry into those cities. There are, however, some problems with these charts which are so significant that they cannot be accepted as support for General Foods' claim that it was simply meeting Folger's offers in those areas.

488. RX 1207 represents Mr. MacDonald's first attempt to prove that General Foods was meeting Folger's competition, but his reconstruction suffers from the fact that the flow charts upon which he relied and which were prepared by General Foods' employees are incomplete. For example, in Syracuse, there were no flow charts from February 3 to March 31 (RX 1207K) and from April 28 through September 22 (Tr. 7200–02). Thus, for eight of the 12 months depicted in Syracuse, General Foods did not produce any records that showed its knowledge of Folger's deals at the time they were offered. During the first quarter of Folger's entry into Pittsburgh, there were also no contemporaneous documents showing General Foods' perceptions of Folger's deals (RX's 1044C, G; Tr. 7172).

489. In addition, these documents rely on a concept called "pyramiding"—which, while it reflects Mr. MacDonald's perception of Folger's offers which the Maxwell House Division was meeting, does not in my opinion, reveal the perception of Division personnel who responded to the Folger offers when they were actually made.

490. "Pyramiding" occurs when a producer "double[s] up one deal on top of another" (Tr. 7142). For example, a producer might offer a $2 trade deal in one period, and offer a $1 count and recount in the next. A retailer, aware of both offers, would purchase in one period and move the product from his warehouse to his stores in the other (Tr. 7142–43) so that he could receive a $3 discount.

491. Since offers are made continuously by producers, it is possible for one who is reconstructing dealing events to "pyramid" them and "prove" that a response which appears at [129] first blush to beat

competition did not do so because it was intended to meet "pyramided" offers.

492. I do not mean to imply that "pyramids" do not exist in the coffee industry. They undoubtedly do. The problem which I have with Mr. MacDonald's reconstruction is that he is a little too ingenious in calling pyramids which benefit General Foods. Thus, his judgment is so subjective that I simply cannot accept his reconstruction.

493. For example, in Pittsburgh, on three pound coffee in September, Mr. MacDonald pyramided Folger's deals (Tr. 7429). For this pyramid, he claimed that retailers would buy heavily on a $3.04 buying allowance and a $.60 count and recount, and then would pyramid that $3.64 rate on to a $2.04 count and recount and $.53 retailer coupon in September, with a resulting dead net of $1.955 (RX 1207G). However, this pyramid could not have taken place. A count and recount is an offer under which the grocer gets paid for moving product from his warehouse to his store (Tr. 6770). It is impossible for a retailer to pyramid two count and recounts in a row, as Mr. MacDonald did with these deals. A retailer cannot collect on two count and recounts on the same coffee, since he already moved the product from the warehouse into the store on the first count and recount, and therefore cannot perform on the second count and recount. Mr. MacDonald suggested on cross-examination that some fictitious retailer might have moved the product from the warehouse to the store and then moved it back to the warehouse so that he could ship it back to his store (Tr. 7596), but there is no evidence that any retailer would do this. Also, Mr. MacDonald conceded that there would be no substantial volume moved on this type of pyramid since the Division would never pay a grocer in the situation where there are two count and recounts on the same can of coffee (Tr. 7597–98).

494. Although the potential for pyramiding by Regular Maxwell House is as great as that for Folger's, Mr. MacDonald appears to have ignored many of them in RX 1207. For example, in Cleveland on two pound coffee in March, Maxwell House was running a $2.40 advertising or display allowance (RX 1207B). In April, that allowance was reduced to $1.20 (RX 1207C). According to Mr. MacDonald's own definition of a pyramid, grocers would have purchased heavily on the $2.40 allowance in March and featured with Maxwell House's 32 cents retailer coupon in April (RX 1207C). Mr. McDonald did not pyramid the earlier allowance, although the situation involved a reduction in case rate and although, in a similar situation, he called a pyramid for Folger (RX 1207B, C; Tr. 7353).

495. Complaint counsel's reply findings reveal that this was not unusual and that in other instances Mr. MacDonald did not call a

Regular Maxwell House pyramid when he should have (CRF 5–31). [130]

496. Other problems exist in Mr. MacDonald's reconstruction. On RX 1207J, he reports a $6.24 buying allowance and a $3.70 advertising/display allowance for Folger running from September 30 through December 2 (RX 1207J). However, Mr. Salesman testified that according to the flow chart which he prepared for this area, Folger only had a $4.32 buying allowance and a $3.70 performance allowance upon entry. He testified that he did not learn that Folger added a $1.92 allowance until December (Tr. 6192–93). Folger reduced revenue recommendations[46] confirm his perception. They show that Folger entered Syracuse with a combination of allowances that added to $4.32 plus a $3.70 merchandising allowance (RX 1185A). These allowances expired on November 2, 1974 (RX 1185A). It was not until November 4 that Folger added the additional $1.92 allowance (RX 1185J). Thus, Mr. MacDonald ignored the testimony of a General Foods' witness, as well as corroborating evidence from Folger's business records.

497. RX 1207 shows the dates on which deals became effective, not when they were announced to the grocery trade, but Mr. MacDonald testified that Folger invariably announced its deals first. For example, in Cleveland on the two and three pound sizes, both Folger's and Maxwell House's dead net prices were effective on March 4. Mr. MacDonald stated that it was his considered opinion that Maxwell House waited for Folger to announce first (Tr. 7348). In rebuttal, complaint counsel introduced CX's 1392, 1397, and 1398 which challenge the conclusion that Maxwell House invariably announced its deals after Folger. These exhibits show that in many instances when the dead net prices were identical, Maxwell House announced its deals before Folger, and that Maxwell House could not have been responding to Folger's deals.

498. After the introduction of complaint counsel's rebuttal exhibits, Mr. MacDonald introduced a revised set of meeting competition charts. His revision, which shows that General Foods was meeting different dead net prices than those shown on its first set of charts, suggests that neither of the charts are entitled to serious consideration.

499. On RX 1292, Mr. MacDonald entered a key that supposedly indicated the Folger dead net price to which Maxwell House was responding. These assignments of Maxwell House's deals to Folger's prices were derived from Mr. MacDonald's [131] experience, but they

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[46] Reduced revenue recommendations record Folger's perception of competitive offers and its response (Tr. 2768).

are unsupported by documents (Tr. 12,208, 12,314).[47] In effect, Mr. MacDonald took the dates from complaint counsel's exhibit and arranged his key in a manner most favorable to General Foods. Whenever the dates indicated that Maxwell House announced a contemporaneous price before Folger, Mr. MacDonald structured his second chart to show that Maxwell House responded to some earlier Folger deal that had already expired.

500. During his first four days of testimony, Mr. MacDonald claimed that Regular Maxwell House's deals were responsive to Folger's deals in effect at the same time. He continually spoke in terms of "rounds" of deals. In each quarter, there would be two or three rounds of deals (Tr. 7223–24). An examination of his first testimony reveals that he analyzed the first set of charts in terms of Regular Maxwell House's response to Folger's contemporaneous rounds of deals. For example, he claimed that its first round of deals was responsive to Folger's first round of deals (Tr. 7450–53, 7231, 7385–86, 7417–23, 7445–46, 7484, 7697–98). However, on the second set of charts, Mr. MacDonald changed his approach and claimed that Regular Maxwell House was responding to Folger deals well after they took effect.

501. For example, during his first testimony, Mr. MacDonald stated that in Cleveland on the three pound size, Regular Maxwell House waited to announce its March dead net price of $1.92 until Folger announced its March $1.92 dead net price (Tr. 7348). However, Regular Maxwell House announced its $1.92 dead net price on January 11, while Folger did not announce its dead net price until January 21 (CX 1392B). Mr. MacDonald then changed his position. On RX 1292, he claimed that Regular Maxwell House's March dead net price was responsive to Folger's dead net price that expired in December (RX 1292C, deals 5D, 15H, key 2).

502. In another case, Mr. MacDonald claimed that in Syracuse in September, the $3.51 dead net price for Regular Maxwell House on three pound was responsive to a $3.51 dead net price for Folger (RX 1292I, deals 7, 17, key 7). For the same time period, he claimed that the $2.36 dead net price for Maxwell House on two pound was responsive to the $2.36 dead net price for Folger (RX 1292H, deals 5, 14, key 7). On both the two and three pound deals, both the Folger and Maxwell House announcement dates were August 26. Despite the exact same date, Mr. MacDonald claimed that Maxwell House was responding to Folger. However, Folger's contemporaneous records show that it [132] was responding to Maxwell House. In fact, Folger had obtained a Maxwell House deal form that specifically identified the Maxwell House dead net price during the period (CX 1379Z–32, Z–

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[47] The only document to which Mr. MacDonald referred was RX 301, but this does not support his detailed reconstruction.

120). Mr. MacDonald's unsupported reconstruction simply does not outweigh the contemporaneous documents demonstrating that Folger was responding to Maxwell House.

503. Complaint counsel have fashioned a chart (following CRF 5–53) which I will not reproduce; however, it presents solid evidence that Mr. MacDonald assigned dead net prices in a manner favorable to General Foods without any consistent or logical justification. This chart lists the deal assignments made by Mr. MacDonald. The dates for Maxwell House's and Folger's deals show the dates on which the deals for both competitors became effective. The lines demonstrate the key used by Mr. MacDonald.

504. The chart reveals that when the prices and dates of contemporaneous deals favored General Foods, Mr. MacDonald aligned the deals vertically (vertical arrow). He indicated that Maxwell House was responding to the Folger deal in effect at the same time. However, when the dates or prices did not favor General Foods, Mr. MacDonald changed approach and claimed that Maxwell House was responding to a Folger deal well after the Folger deal became effective (right-slanted arrow). For example, the chart for Pittsburgh shows that the two pound dead net price for Maxwell House beginning on February 18 was responsive to the Folger dead net price that began on November 19, three months earlier. However, the same chart shows that the Maxwell House dead net price beginning on May 14 was responsive to the Folger dead net price beginning at the same time.

505. Complaint counsel's criticisms of Mr. MacDonald's charts are well founded, and I am satisfied that his use of pyramids and his assignment of deals on RX 1292, while creative and ingenious, are so subjective that they do not prove the perception of Folger's deal by General Foods employees during the relevant time periods. Thus, despite the evidence of general intent, I could not find, if it were necessary, that General Foods' has satisfied its burden of proving that it met, but did not beat, Folger's deals in Cleveland, Pittsburgh and Syracuse. [133]

III. CONCLUSIONS OF LAW

A. *The Relevant Geographic Market For Regular Coffee Is Nationwide*

1. Introduction

Complaint counsel's claim that General Foods attempted to monopolize the HFNI "markets" (CLA, p. 1) requires a finding that the relevant geographic market for regular coffee is no larger than a sales district, for they do not allege that in any larger area—either the entire HFNI or nationwide—did General Foods possess the market power to succeed in an attempt to monopolize the sale of regular coffee.

I cannot make such a finding, for the pertinent evidence on the issue reveals that the relevant geographic market for regular coffee is nationwide. Much of the evidence offered by complaint counsel relates to the marketing activities of wholesalers and retailers, but this is irrelevant in a determination of the market for the production and sale of regular coffee by roasters.

2. Market Areas And Sales Districts Are Not Relevant Geographic Markets

(a) *Transportation Costs*

The relevant geographic market for a product is the area to which customers can practicably turn for alternative sources of supply. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961).

A recent Commission case, *Pillsbury, Inc.,* 93 F.T.C. 966 (1979) applied the *Tampa Electric* test to a grocery product. The issue in *Pillsbury* was whether that company's acquisition of Fox Deluxe Foods violated Section 7 of the Clayton Act. The parties agreed that the United States was a relevant geographic market, but complaint counsel also argued that regional submarkets existed.

The Commission found that transportation costs posed no significant barrier to the distant shipment of frozen pizzas and held that geographic submarkets did not exist: [134]

> The test for measuring geographic market is where consumers (in this case retailers) can practicably turn for an alternative source of supply. Here the record is clear that frozen pizza manufacturers could sell virtually throughout the United States from a single plant with no significant cost disadvantage. Thus, the power of any given group of sellers serving a city or region at a given time to raise prices is limited by the capacity of virtually all other domestic manufacturers to compete on practically an equal footing in that city or region—an economic situation which requires a finding of a national market and the elimination of geographic submarkets. *Id.* at 1030.

Complaint counsel point to the Commission's statement in a footnote that "special factors, like slight economic barriers, could produce submarkets" (*Id.* n. 8; CLA, p. 108), but this record reveals no economic or legal barriers to the nationwide shipment of regular coffee (Findings 105–16).

Another Commission Section 7 case involving a grocery product emphasized the significance of transportation costs in the determination of the relevant geographic market. The complaint in *Golden Grain Macaroni Co.,* 78 F.T.C. 63 (1971), *aff'd,* 472 F.2d 882 (9th Cir. 1972), *cert. denied,* 412 U.S. 918 (1973), alleged that the relevant geographic market for the production and distribution of dry paste products was a four-state region in the Pacific Northwest. The Commission stated that:

> The appropriateness of the Pacific Northwest as a geographic market in which to determine whether respondents possess monopoly power turns on the significance of transportation costs to outside producers. *Id.* at 158.

While the Commission found that the Pacific Northwest was the relevant geographic market because "freight costs constitute a barrier sufficiently high to forestall entry by firms with production facilities outside" that area, *Id.* at 159, it refused to accept complaint counsel's argument that there were [135] also three geographic submarkets. The reason was that "the record fails to show that transportation costs between one and another of the three areas is so great in relation to the overall cost [of dry paste] as to make these areas separate submarkets." *Id.* at 159.

The Commission in *Golden Grain* remarked on the same phenomenon that exists in this case—the shipment of products into the alleged submarkets by outside producers:

> . . . both Major and respondents, although operating exclusively out of plants in Seattle, sell a significant amount of their products to retailers in the three alleged submarkets. *Id.* at 159.

Other cases dealing with the issue of relevant geographic market stress transportation costs. In *United States* v. *Hammermill Paper Co.,* 429 F.Supp. 1271 (W.D. Pa. 1977), the government argued that in addition to a nationwide market for paper manufacturing, New England was a relevant market because an acquired paper merchant was the largest firm of its kind operating in that area. The court rejected this argument:

> Paper manufacturers located in New England compete effectively in the Midwest against manufacturers with mills located there, and mills in the Midwest compete for sales in New England. Paper manufacturers in New England do not sell primarily in New England but sell throughout the United States. Paper manufacturers do not find it necessary to build mills in New England to participate in the New England trade. *Id.* at 1278.

In *RSR Corp.,* 88 F.T.C. 800 (1976), the Commission held that the fact that secondary lead manufacturers "can and do frequently ship products into regions far distant from their plants" demonstrated substantial regional interdependence even in the face of relatively high transportation costs. *Id.* at 885. *See also International Telephone*

& Telegraph Corp. v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 937 (9th Cir. 1975). [136]

(b) *Complaint Counsel's Argument Relies On Irrelevant Facts*

Complaint counsel's emphasis on local demand factors injects irrelevant considerations into the issue of relevant geographic market. The error in their reasoning was described accurately several years ago in *The Market: A Concept In Antitrust*, 54 Colum. L. Rev. 580, 598–99 (1954):

> Underlying much of this discussion is the premise that it is essential to distinguish between markets at different levels in the chain of sellers. This has not always been clearly discerned by the courts. An example of the resulting confusion is found in *United States* v. *National City Lines, Inc.*, where the defendants were charged with conspiring to monopolize the sale of busses and bus supplies in forty-five cities by means of exclusive dealing contracts which excluded others from selling to the transportation company that operated the busses in those cities. One defense was that Section 2 of the Sherman Act applied only to monopolization of a geographic market. Holding against the defendants, the court stressed the fact that the operating company had a monopoly in the forty-five cities, and that this constituted the geographic market which the suppliers had monopolized by excluding competitors. The court apparently regarded the forty-five cities as a geographic market for the sale of bus supplies, an absurd view in light of the fact that bus products are sold on a nationwide basis. The area in which the buyers of bus supplies do their purchasing—in this case, the whole nation—should be the geographic market for the sellers of these supplies.

The court in *Hammermill* made the same point:

> The arguments that paper merchants in New England "cannot and do not compete with paper merchants located in other sections of the country" does not establish that New England is a separate section of the country for measuring the anticompetitive effect of [137] Hammermill's acquisition, because the same criteria apply to all paper merchants in any section of the country. The principal function of a paper merchant anywhere is to serve the local printing trade with a variety of lines, locally warehoused, and available for quick delivery in a large range of quantities.
>
> We cannot find the facts establishing the close relationship between paper merchants and printers to be relevant to the question of the effect of this acquisition to lessen competition among manufacturers of printing and fine papers in the sale of their products to paper merchants. 429 F.Supp. at 1278–79.

Here, too, complaint counsel's claim that the retail distribution of regular coffee is contained within sales districts—whether true or not[48]—ignores the fundamental point. While this says much about the geographic market for the sale of regular coffee by retailers, it is simply irrelevant where the issue is the relevant geographic market for the sale of regular coffee by producers.

Furthermore, industry recognition that demand differs from region to region and that deals must be tailored to these regions says nothing about which producers retailers and wholesalers can practicably turn to for their supplies: It merely indicates that producers who compete over a much broader area than a sales district often must take into account the different desires of customers located in different regions of the country.

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[48] In fact, this confinement is breaking down (Findings 90–104).

Not all coffee producers compete in every city throughout the United States, and their market shares differ from city to city (Findings 117–18), but where there are no significant transportation costs, this does not mean that regional submarkets exist:

> There is considerable evidence that retail frozen pizza manufacturers often target, or [138] even confine their marketing regionally. Thus, in any particular city, only Pillsbury, Fox, and three or four other frozen pizza manufacturers might be selling at any given time. In such local markets, Pillsbury's and Fox's market shares of course would be high and perhaps sufficient to indicate anticompetitive effects under Section 7. But "[w]e do not believe the pie will slice so thinly," at least not on this record. The test for measuring geographic market is where consumers (in this case retailers) can practicably turn for an alternative source of supply. *Pillsbury,* 93 F.T.C. at 1030.

See also Golden Grain, 78 F.T.C. at 159–60.

Complaint counsel also argue that Regular Maxwell House's "product differentiation" advantage creates barriers to entry into the sales districts which, by virtue of these barriers, are relevant markets (CLA, p. 101; CRLA, pp. 24–25).

Complaint counsel's argument is a theoretical construct which finds no support in the record. Hill Bros.' entry into the HFNI in the 1960's and other roasters' expansion within the HFNI even after Folger's entry (Findings 322–24) establishes beyond question that Regular Maxwell House's "product differentiation" advantage if it exists, has not raised even modest entry barriers to other coffee roasters.

The price data relied upon by complaint counsel can be interpreted in several ways and it can be rejected as an indicator of separate geographic markets for that reason alone (Finding 130, n. 11), but it suffers from an even more fundamental defect. A relevant geographic market contains all producers and purchasers whose interactions affect price, but complaint counsel presented evidence of price differences in the sale of a single brand of coffee, Regular Maxwell House. Thus, this price data does not reflect the supply and demand forces that operate with respect to the sale of regular coffee.[49] [139]

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[49] Dr. Elzinga agreed that it is appropriate to analyze Regular Maxwell House's market power rather than that of all of General Foods' regular coffee brands (Footnote 23), but that power can only be analyzed in relationship to the relevant geographic market in which it is sold, and that market contains all regular coffee producers operating within its confines.

(c) *Conclusion*

In conclusion, complaint counsel's argument that the relevant geographic market for regular coffee is no larger than a sales district is based on irrelevant facts. The most significant fact in this record is that the relative transportation costs for regular coffee are so low that producers are able to ship their coffee anywhere in the United States. These producers compete or, if they so choose, can compete, throughout the nation, and the relevant geographic market for regular coffee is nationwide.

B. *General Foods Did Not Attempt To Monopolize The HFNI Regular Coffee "Markets"*

1. Introduction

Since complaint counsel do not claim that General Foods, through its Maxwell House Division, attempted to monopolize the relevant market—the nation—the Section 5 count could be dismissed without analyzing their claim that General Foods monopolized the sale of regular coffee in what they claim are relevant geographic markets—the Division's market areas and sales districts. However, so much effort has been devoted to the market power and sales below cost issues that the parties are entitled to my views on the evidence offered by complaint counsel in support of their argument.

2. Elements Of An Attempt To Monopolize

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, empowers the Commission to prohibit unfair methods of [140] competition, and this power has been construed to reach conduct that violates the prohibitions of the Sherman Act. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 609 (1953).

The elements of the offense of attempted monopolization were described in *Swift & Co.* v. *United States,* 196 U.S. 375, 396 (1905):

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.

The three elements of this offense were recently restated by the Commission in *E.I. DuPont de Nemours & Co.,* 3 CCH Trade Reg. Rep. ¶ 21,770 at 21,970–71 (Oct. 20, 1980) [96 F.T.C. 653]:

> . . . the attempt offense includes three principal elements: (1) specific intent to control prices or destroy competition, (2) exclusionary or anticompetitive conduct, and (3) a dangerous probability of success. *Id.* at 21,970.

The Commission in *DuPont* recognized that while all three elements must be satisfied:

> These criteria, however, are not mutually exclusive but rather are interrelated to the extent that evidence of conduct may shed light on intent and the probability of success; conversely, evidence of a respondent's purpose may reveal the extent to which there are legitimate business justifications underpinning the respondent's conduct. *Id.* at 21,971. [141]

3. Specific Intent To Control Prices Or Destroy Competition

Read with an uncritical eye, some of the statements by General Foods' employees and agents might lead one to believe that they were looking forward to Folger's entry into the HFNI as an opportunity to increase Regular Maxwell House's market share and profits in that area.

The reality is different. The Maxwell House Division was aware at the time of Folger's entry into the HFNI that Procter & Gamble was a formidable competitor (Findings 218–27), and it did not look forward with satisfaction to the impending struggle for regular coffee share in the HFNI since there was no real hope that Folger's could be excluded from any area that it chose to enter (Findings 231–32).

Despite this serious threat, the Maxwell House Division's initial response to Folger's Cleveland introduction was modest (Finding 149), and it was only after management became seriously concerned that the "defend now" strategy was adopted (Findings 154–66). In fact, even as late as Folger's Syracuse entry, the Division did not match its trade rates (Findings 193–99).

While the "defend now" strategy projected losses in Year I in the HFNI as Folger's marketing expenditures were met by the Division, it was, realistically, the only strategy which had any chance of success. The adoption of alternative strategies would certainly have resulted in significant share and profit losses (Findings 228–30).

Thus, despite some suggestive statements in internal documents, the weight of the evidence—especially taking into account the nature of the competitor which the Maxwell House Division was facing—establishes that the Division's overall intent was to engage in an honest competitive struggle with the new entrant.

Since the Maxwell House Division's actions were "predominantly motivated by legitimate business aims," I cannot find that it had a specific intent to monopolize the sale of regular coffee, whether the relevant geographic market is nationwide or circumscribed by the boundaries of a market area or a sales district. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 627 (1953); *see also Lektro-*

Vend Corp. v. *Vendo Co.,* 1981-2 CCH Trade Cases ¶ 64,258 at 74,089 (7th Cir. 1981). [142]

The inevitable consequence of General Foods' decision to defend vigorously its regular coffee market share and profits was losses by the new entrant and a few of its smaller competitors (Findings 240–73), but the competitive struggle inevitably involves winners and losers, and the intent to compete and succeed is not anticompetitive:

> More than an intent to win every sale, even if that would result in the demise of a competitor, is required before it can be concluded a defendant has the type of exclusionary intent condemned by the antitrust laws. *Transamerica Computer Co.* v. *IBM,* 481 F.Supp. 965, 1010 (N.D. Cal. 1979).

See also William Inglis & Sons Baking Co. v. *ITT Continental Baking Co.,* 652 F.2d 917, 932 (9th Cir. 1981): "Direct evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation"; *International Air Industries, Inc.* v. *American Excelsior Co.,* 517 F.2d 714, 719, 723 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976); III *Antitrust Law* ¶ 822a, at 314 (1978).

Complaint counsel answer, however, that the Maxwell House Division's actions were not honestly competitive, for the Division sold below average total cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district, introduced a "fighting brand" into Syracuse, retaliated against Folger's in the West and copied its "Mrs. Olsen" campaign (CLA, p. 33).

In *Transamerica,* the court stated:

> A firm that prices its product at levels above marginal or average variable cost is not necessarily engaged in clearly exclusionary conduct. A firm that prices its products below those levels is. 481 F.Supp. at 989.

Complaint counsel rely on this case and statements by Areeda & Turner for the proposition that regardless of actual intent, pricing below reasonably anticipated average variable cost should be characterized as a *per se* attempt to monopolize because such pricing: [143]

> (1) [is] totally unrelated to competition on the merits . . .;
> (2) clearly implies the presence or prospect of some degree of durable market power . . .; [and]
> (3) has potentially significant exclusionary effects in the generality of cases . . . III *Antitrust Law* ¶ 820, at 313.

Furthermore, Areeda & Turner:

> . . . would not permit a monopolist to price below marginal cost in order to meet the lawful price of a rival. III *Antitrust Law* ¶ 717, at 178.

On the other hand, the Commission held in *Golden Grain,* 78 F.T.C. at 165 that, with respect to the pricing of a firm which one could characterize as dominant in the relevant market:

> even if we should find that respondent's sales were below cost, if we find further that they acted defensively in reaching such a pricing level, their conduct will not be illegal because of the absence of the requisite predation. *See also United Fruit Co.,* 82 F.T.C. 53, 162 n. 43 (1973):

> Although predatory intent may be inferred from sales below cost, this inference does not arise when there is evidence that the below-cost level was reached defensively.

The Maxwell House Division did sell below cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district (Finding 423), but I cannot infer from this fact alone a specific intent to monopolize since it ignores the reason for the Division's actions. [144]

The Division sold below average variable cost as a direct result of the significant threat posed by its much larger rival, Procter & Gamble. The Division could have, as complaint counsel suggest, responded less vigorously to Folger's entry, but this would have been disastrous. The Division, in my opinion, chose the only possible response—head-to-head competition. And, although General Foods was unable to satisfy me that it could establish a meeting competition defense to the Robinson-Patman charge, I am convinced, once the more rigorous requirements of Section 2(b) are set aside, that while there may have been instances of leading Folger's in promotions, the Division's general intent was to meet, and not beat, Folger's prices and promotions (Findings 476–86).

Futhermore, Procter & Gamble's proven track record—in addition to providing the impetus for the Division's vigorous response—and the absence of market power establishes that there was no likelihood that the Division could use its Regular Maxwell House brand to successfully monopolize a market area or sales district (*infra*). Thus, this is not "the generality of cases" which Areeda & Turner refer to in their *per se* rule, and I will not infer specific intent to monopolize from the Division's defensive, below cost pricing for if I were to do so, it would amount to a holding that a large firm (as opposed to a monopolist or one with substantial market power) would not be able to compete with equally large or larger firms.[50] *See United Fruit, supra,* 82 F.T.C. at 163:

> Certainly the logic of complaint counsel's argument would require companies con-

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[50] Complaint counsel argue that under the rationale of *Borden, Inc.,* 92 F.T.C. 669, 798–802 (1978), the Maxwell House Division's prices cannot be defended on the ground that it was meeting competition (CLA, p. 62), but *Borden* involved a monopolist. Regular Maxwell House's shares in its sales districts never approached monopoly proportions (Finding 377).

cerned with competitive threats in the marketplace to sit back and wait until they become a reality before taking action. This is surely not the aim and purpose of our competitive marketplace nor the role of competition which this Commission was created to promote. [145]

4. Exclusionary Or Anticompetitive Conduct

In *DuPont*, the Commission held that the conduct element of the offense of attempted monopolization is satisfied by proof that "unreasonable" means were used to control prices and restrict competition. 3 Trade Reg. Rep. at 21,972. Other cases suggest that conduct which is "unfair or unreasonable" *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76, 85 (2d Cir. 1981), or which is "without legitimate business purpose" *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978), is exclusionary or anticompetitive.

Even monopolists are allowed some freedom to respond to competitive threats. In *SuperTurf, Inc.* v. *Monsanto Co.*, No. 80–1484 (8th Cir., Oct. 2, 1981), Monsanto, a monopolist in the artificial turf market, was alleged to have priced below cost in an effort unlawfully to eliminate competition. Evidence indicated that Monsanto engaged only in competitive defensive pricing and that SuperTurf, Inc. had initiated the price warfare. The Eighth Circuit held that:

> Even if Monsanto is a monopolist, it was within its rights to respond to the lower prices of its competitors while still pricing above its marginal costs. Slip Op. at 14.

Of course, Regular Maxwell House has not had nor does it have monopoly or market power in the relevant market—the nation—or in any of the sales districts or market areas. It has never even approached such power in these areas, contrary to complaint counsel's claim (CLA, pp. 109–10).

Because it has never had monopoly power or even approached it in the sales districts or the nation, the sale of Regular Maxwell House below average variable cost in two market areas and one sales district (again, assuming that they are relevant geographic markets) was not anticompetitive or exclusionary; it was, instead, legitimately defensive behavior. *Golden Grain, supra; United Fruit, supra.*

While the use of the Horizon brand in Syracuse had no purpose other than to respond to Folger's entry (Findings 425–27), and in that sense was not "legitimate", I do not believe [146] that the use of a fighting brand by a company lacking monopoly power in one sales district against a larger rival was inherently anticompetitive. *Compare United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911). The

Division's western retaliation (Findings 428–30) and its "Cora" campaign (Findings 431–35) were legitimate defensive acts.

My conclusion with respect to Horizon and the western retaliation is not altered by the claims that Horizon was sold below cost (CPF 4–35 to 4–37) and that Regular Maxwell House's trade rates equalled contribution margin in Kansas City and Dallas (CPF 5–20 to 5–26), for Horizon was a new entrant into Syracuse, and Regular Maxwell House's western retaliation was similar to Folger's expensive Cleveland entry.

5. Dangerous Probability Of Success

Whether a dangerous probability of success exists requires a definition of the relevant geographic market in which the challenged conduct took place, and an assessment of the accused's power to exclude competition or control prices within the market. *Richter Concrete Corp.* v. *Hilltop Basic Resources, Inc.*, 1981-1 CCH Trade Cases ¶ 63,947 at 75,891 (S.D.. Ohio 1981); *General Communications Engineering, Inc.* v. *Motorola Communications & Electronics, Inc.*, 421 F.Supp. 274, 292 n. 42 (N.D. Cal. 1976).

The cases dealing with this issue generally look to a company's market share to determine whether it has the ability to succeed in attaining monopoly power in the relevant market. *See, e.g., Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969). *See also*, III *Antitrust Law* ¶ 831, at 336:

> Perhaps as an aid to predicting dangerous future probability, the cases also require that the defendant possess a measure of present proximity to completed monopoly—a measure of power in a relevant market. As with monopoly, the requisite market position is normally measured through an analysis of market share. Although precise definition of the requisite position is no easier here than in the case of monopoly itself, it is clear that the basic thrust of the classic rule is the presumption that attempt does not occur in the absence of [147] a rather significant market share. The defendant need not have present market power, but its position must be sufficiently "proximate" to monopoly that the challenged conduct threatens success. Moreover, the presumption resting on market share may be overcome on a showing that the market is so narrowly defined, or entry so free, that "success" would not yield the *substantial* market power needed for the offense of completed monopolization (emphasis in original).

No particular market share can be said to evidence the market power needed to succeed in an attempt to monopolize: Complaint counsel suggest that a 40% absolute market share is enough, citing, for example, *Broadway Delivery Corp.* v. *United Parcel Service*, 1981-1 CCH Trade Cases ¶ 64,068 at 74,469 (2d Cir. 1981). Since Regular Maxwell House's share exceeded this figure in some HFNI sales districts, they argue that there was a dangerous probability that the Maxwell House Division would acquire monopoly power (CLA, p. 113).

General Foods naturally disagrees, citing *Hoffman* v. *Delta Dental Plan,* 1981-1 CCH Trade Cases ¶ 64,138 at 76,838 (D. Minn. 1981), which held that a 40% share of market was insufficient as a matter of law to permit the inference of dangerous probability of success.

Given the divergence of opinion on this issue, I cannot find that Regular Maxwell House's market share in the nation, the HFNI or in any of the HFNI sales districts was so large that, as a matter of law, it possessed the market power which would make it dangerously probable that the Division could succeed in monopolizing the sale of regular coffee in those areas (Finding 377).

Other facts of record beside market share convince me that the Division could never have succeeded in acquiring monopoly power in the HFNI sales districts—that is, the power to control prices or exclude competition, *United States* v. *Grinnell Corp.,* 384 U.S. 563, 570–77 (1966); *United States* v. *E.I. DuPont de Nemours & Co.,* 351 U.S. 377, 391 (1956).

Barriers to entry into the HFNI sales districts are minimal (Findings 321–24), and if the Division attempted to raise prices to the monopoly level, new entrants would be attracted into the districts (Finding 440). [148]

Futhermore, because of a decline in demand, the regular coffee industry had substantial excess capacity (Findings 20–24), and the Maxwell House Division could not, therefore, restrict its output and raise prices in the sales districts, for other roasters would simply increase their output. *See* II *Antitrust Law* ¶ 501, at 322; *Transamerica Computer Co.* v. *IBM,* 481 F.Supp. 965, 974–75 (N.D. Cal. 1979). Finally, Folger's greater staying power must be considered.

Considering all of these facts, I find that the Division's sales below average variable cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district were not predatory. III *Antitrust Law* ¶ 711b, at 151–52:

> ... predation in any meaningful sense cannot exist unless there is a temporary sacrifice of net revenues in the expectation of greater future gains. Indeed, the classifically feared case of predation has been the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition. Thus, predatory pricing would make little economic sense to a potential predator unless he had (1) greater financial staying power than his rivals, and (2) a very substantial prospect that the losses he incurs in the predatory campaign will be exceeded by the profits to be earned after his rivals have been destroyed.
>
> As for the first prerequisite, it should, of course, be recognized that predation cannot be successful, and therefore is unlikely to occur, when the predator's rivals possess resources comparable to his own. Even when an alleged predator has greater staying power, however, attention must also be given to the second prerequisite, which is less likely to occur. Although a predator may drive competitors into bankruptcy, their

durable assets may remain in the market in the hands of others. Moreover, a firm can anticipate monopoly profits for only so long as its monopoly prices do not attract new entry. [149] Losses incurred through predation could be regained in markets with very high barriers to entry. In many markets, however, and especially in those having a number of small rivals, entry barriers may be non-existent or at least too low to preclude entry. Admittedly, a demonstrated willingness to indulge in predatory pricing might itself deter some smaller potential entrants, but it is unlikely to inhibit firms with resources comparable to those of the predator.

Complaint counsel argue, nevertheless, that the Division's ability to achieve high profits for Regular Maxwell House despite the decline in demand reveals that brand's market power (CRF's 4–27 and 4–28). The problem with this argument is that I cannot accept Professor Dearden's computations and their comparison with Dr. Mann's benchmark as evidence that Regular Maxwell House's profits were higher than normal. Furthermore, even assuming that Regular Maxwell House's profits were high, there might well be reasons for this other than market power. *See Transamerica, supra,* at 981:

> . . . the inference that a defendant that enjoys healthy profits only does so because of an unhealthy market structure is not a strong one. Good management, superior efficiency and differences in accounting provide explanations that are just as plausible, and none of those explanations is inconsistent with an effective competitive market.

In *Boise Cascade Corp.,* 91 F.T.C. 1 (1978), *rev'd on other grounds,* 637 F.2d 573 (9th Cir. 1980), the Commission stated that: "The persistence of supra-normal profits over some period of time may signal the existence of anticompetitive conduct . . ." but, "Recognizing the uncertainties that are likely to attend the use of profit data as evidence of anticompetitive conduct, and the additional uncertainties as to the particular data introduced in this case" placed little reliance on the data. *Id.* at 97. Similar uncertainties exist in this case (Finding 376).

Thus, it is simply inconceivable, given Procter & Gamble's marketing expertise and its financial resources and Regular [150] Maxwell House's lack of market power, that the Division could succeed in monopolizing the sale of regular coffee in the HFNI sales districts. In fact, Folger is now the number one regular coffee in the United States and has succeeded in reducing Regular Maxwell House's share in the HFNI sales districts (Findings 276–79), and other companies have been able to survive and prosper in the HFNI.[51] *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.,* 614 F.2d 832, 841 (2d Cir. 1980); *Lektro-Vend Corp.* v. *Vendo Corp.,* 500 F.Supp. 332, 356 (N.D. Ill. 1980); *aff'd,* 1981–2 Trade Cas. (CCH) ¶ 64,258 (7th Cir. 1981); *Dia-*

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[51] Complaint counsel state that the success of one company, Chock Full O'Nuts, occurred after the alleged predation in Syracuse (CRLA, p. 11, n. 9), but there is no reason why the success or failure of allegedly predatory tactics must be measured solely during the time such practices supposedly occurred. *See Lektro-Vend, supra,* at 74,087.

mond International Corp. v. *Walterhoefer,* 289 F.Supp. 550, 578 (D. Md. 1968). *See also, Berkey Photo, Inc.* v. *Eastman Kodak Co.,* 603 F.2d 263, 273 n. 11 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980) (noting that jury could consider significance of decline in market share).

6. Conclusion

Assuming that the Maxwell House Division's HFNI sales districts are relevant geographic markets, its sales of Regular Maxwell House below average variable cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district, and its use of the Horizon brand in that sales district do not reveal specific intent to control prices or destroy competition, nor was its conduct exclusionary or anticompetitive. In view of Regular Maxwell House's lack of the necessary market power, the Division's conduct was, instead, legitimately defensive. Furthermore, the lack of market power, the ease of entry into the sales districts, the declining demand for regular coffee, and the nature of its chief rival for market share in the HFNI sales districts establishes that there was no dangerous probability that the Division could succeed in monopolizing the sale of regular coffee in those districts. In conclusion, General Foods did not, through its Maxwell House Division, attempt to monopolize the sale of regular coffee in the nation, the HFNI or in the HFNI sales districts, nor were its acts "so inherently anticompetitive that they constitute unfair methods of competition" (CLA, p. 142), for they are lawful under Sherman [151] Act standards, they do not amount to an incipient violation of the antitrust laws, *FTC* v. *Motion Pictures Advertising Service Co.,* 344 U.S. 392, 394–95 (1953), and they do not violate the "spirit" of any antitrust law or important public policy. *FTC* v. *Sperry & Hutchinson,* 405 U.S. 233, 244 (1972). Therefore, the Section 5 count of the complaint will be dismissed.

C. *General Foods Did Not Violate The Robinson-Patman Act*

1. RECU's Are Not Discounts From List Price

According to complaint counsel, the Robinson-Patman Act price "must include a subtraction for all offers made available to retailers" (CLA, p. 152). *Kapiolani Motors, Ltd.* v. *General Motors Corp.,* 337 F.Supp. 102 (D. Hawaii 1972), one of the cases they cite, defines Robinson-Patman price as "the actual amount paid to the supplier for goods furnished." *Id.* at 104.

This case does not however, support the claim that RECU's are an element of price, for it is clear that RECU's do not affect the price paid by a retailer to the Maxwell House Division, and the Division does not make RECU's "available to retailers." They are, rather, made available to the consumer through retailers, for they differ in no significant way from consumer coupons which complaint counsel agree are not an element of Robinson-Patman price (Findings 447–49).

Thus, I agree with General Foods that the recent decision in *Indian Coffee Corp.* v. *Procter & Gamble Co.,* 482 F.Supp. 1104 (W.D. Pa. 1980) is persuasive here, for even though it dealt with consumer coupons rather than with RECU's, no "principled basis exists" for distinguishing between them (RLA, p. 154).

In *Indian Coffee,* a local coffee producer charged Procter & Gamble with unlawful price discrimination arising from Folger's entry into the HFNI. The court agreed with Procter & Gamble, which argued that consumer coupons were not reductions in price under Section 2(a):

> [I]t is clear to us that Folger's consumer coupons reduced the price solely to the ultimate *consumer* and not to Folger's customer, who under § 2(a) are the retailers, since those [152] retailers received absolutely no price concession and served merely as redemption agents for Folger (emphasis in original). *Id.* at 1109.

The Commission's decision in *Fred Meyer, Inc.,* 63 F.T.C. 1 (1963), *rev'd in part and enforced,* 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968), which the court in *Indian Coffee* refused to follow, is, nevertheless, cited by complaint counsel as support for their claim that retailer coupons are price reductions. The decision does so hold, but the facts which led to the Commission's decision are different from those of the present case.

In *Fred Meyer,* respondent, a retailer, had been conducting since the mid 1930's annual coupon book promotion under which it published and sold books to consumers which contained some 72 coupons featuring an article sold by Fred Meyer. Consumers could redeem those coupons and purchase the featured items at a reduced price.

Fred Meyer's suppliers participated in its program by selling to it "at specially reduced prices a quantity of merchandise necessary to cover expected redemption, or by giving free merchandise, and/or by paying respondent a fee of $350." 63 F.T.C. at 12. The Commission held that these redemption payments were price reductions:

> The only possible "service" that respondents performed in return for the $4,814 is that they resold the goods at the same 1/3 price reduction that they had received from the supplier. (They actually agreed to do so.) But this "passing on" of the discriminatory lower price is the very worst of the vices involved in price discrimination. . . . Thus, it would be a strange result indeed if we were to hold that a buyer, by passing on to his own customers a price discrimination he has received from his supplier, has merely performed a "promotional service" for that supplier! 63 F.T.C. at 33.

An administrative law judge's decision which was not appealed to the Commission also found that a program similar to General Foods' involved a price reduction. *Purex Corp.*, 51 [153] F.T.C. 100, 103 (1954). *See also National Tea Co.*, 46 F.T.C. 829, 833–34 (1950), *order modified*, 47 F.T.C. 1314 (1951).

Despite the language cited by complaint counsel, there are important differences between *Fred Meyer* and this case. Fred Meyer induced payments from its suppliers and set up the ground rules under which they were made, and it is apparent that the Commission viewed the whole arrangement as a sham designed by that company to induce price concessions:

> Where money or something of value is given by a seller to a buyer without even the contemplation of promotional services by the purchaser there has been no payment 'as compensation or in consideration' for such services and Section 2(d) is therefore not applicable. 63 F.T.C. at 33.

The Maxwell House Division's RECU's had a different inception and a different purpose. There is no evidence that any customer induced the Division to develop its RECU program. The Division, rather than its customers, sets the conditions under which it will redeem its RECUs, and the purpose of the Division's coupons, whether they are RECUs or consumer coupons is identical—to promote its coffees, not to give retailers a hidden price concession.

One final fact convinces me that RECU's are not price concessions, and that is their reception by retailers. One would be surprised if Fred Meyer, after arranging its coupon program with suppliers, failed to take full advantage of it, for its purpose was to benefit Fred Meyer. On the other hand, retailers do not always participate in the Division's RECU programs, a convincing demonstration that they do not view them as price reductions (Finding 456). I therefore find that the Maxwell House Division's RECU's are not deductions from the price paid by retailers to the Division and are therefore not cognizable under Section 2(a).[52] [154]

2. Performance Allowances Are Not Discounts From List Price

Complaint counsel argue that the Maxwell House Division's performance allowances are price reductions because the performance required is much less than the benefit received by the retailer.

The *Fred Meyer* Guides state:

> Allowances that have little or no relationship to cost or approximate cost of the service provided by the retailer may be considered to be in violation of Section 2(d) or subject

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[52] This finding is not inconsistent with my decision in the Section 5 part of these findings that RECU's affect the "economic price" for that price is the revenue received by the Division, and the Division's revenue is reduced to the extent that RECU's or consumer coupons are redeemed by retailers.

> to the prohibitions of Section 2(a) of the amended Clayton Act, such as an allowance of $1 per case of goods purchased if the retailer furnishes a display or provides shelf space . . . 16 C.F.R. 240.9 n. 2 (1981).

There is no dispute that the Maxwell House Division requires its customers to perform if they receive promotional allowances (CLA, p. 156), and the case which gave rise to the Guides emphasized that because this element was lacking, the allowances in question were price reductions. *Fred Meyer, supra,* 63 F.T.C. at 33.

Complaint counsel argue nevertheless that the Division's promotional allowances should be treated here as offering discounts from its list prices because the Division's customers retain much more of the allowance than they spend in performance.

While General Foods argues that complaint counsel have not met the burden imposed on them by the *Fred Meyer* Guides (RLA, p. 160), I am willing to concede that many retailers receive a substantial benefit from the monies which are left after their cost of performance is deducted from the allowances they receive. I also concede that some authorities have chosen to view allowances similar to the Division's as price reductions. *See Continental Baking Co.* v. *Utah Pie Co.,* 349 F.2d 122, 130 [155] (10th Cir. 1965), *rev'd on other grounds,* 386 U.S. 685 (1967); *Borden, Inc.,* 92 F.T.C. 669, 797 (1978).[53]

Despite the cases cited above, I believe that the Division's promotional allowances should not be treated as price concessions, but as Section 2(d) payments. I agree that promotional allowances which are "promotional" in name only should be treated as price concessions. One must not forget that the Commission in *Fred Meyer* held that Section 2(d) was not applicable because the payments were made "without even the contemplation of promotional services by the purchaser" 63 F.T.C. at 33, and it is with this in mind that one must read the subsequent *Fred Meyer* Guides.

Thus, Rule 9, footnote 2 of the Guides was designed to eliminate from serious consideration as Section 2(d) allowances those programs which required trivial performance—*i.e.,* programs which are not truly promotional. The Division's advertising allowances were designed to promote the resale of its products (see *Rickles* and *Kirby, infra*),[54] not to give hidden price concessions to its customers.

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[53] On the other hand, since *Borden* was not a Robinson-Patman case, its precedential effect is questionable.

[54] Compare the Maxwell House Division's "buying allowances" where the only performance required is the purchase of coffee. This is clearly a price concession under the *Fred Meyer* rationale.

3. Treating RECU's And Performance Offers As Discounts From List Price Would Subject Manufacturers To Unwarranted Liability For Price Discrimination

Assuming that the Maxwell House Division offers its RECU's and performance allowances to all competing customers on proportionally equal terms, *Fred Meyer* Guides, 16 C.F.R. 240.7 (1981), treating them as discounts from list price could result in liability for secondary line injury, for customers who did not choose to participate in these offers would be paying a higher "price" than those who did (RLA, p. 164). This suggests, contrary to complaint counsel's argument, that a true advertising allowance should not be subject to scrutiny under Section 2(a). *See Rickles, Inc.* v. *Frances Denney Corp.*, 508 F.Supp. 4 (D. Mass. 1980), in which the court dismissed allegations that promotional payments and services were Section **[156]** 2(a) price reductions because the payments were provided in connection with projected resale of the product: "The alleged discriminations in this case properly are subsumed exclusively under Sections 2(d) and 2(e), rather than Section 2(a)." *Id.* at 6.

In *Kirby* v. *P.R. Mallory & Co., Inc.*, 489 F.2d 904 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974), the court rejected the position now being advocated by complaint counsel, stating that the "theory that Sections 2(d) and 2(e) proscribe acts which are themselves prohibited by Section 2(a) is not supported by either the legislative history or scheme of the [Clayton] Act." *Id.* at 910.

In holding that promotional allowances covered by Section 2(d) were not elements of price for purposes of Section 2(a) price discrimination, the court focused on the different statutory standards governing price discrimination and promotional discrimination, and the fact that the payments and services under consideration were provided in connection with "projected resales":

> Congress . . . imposed stricter standards of legality respecting promotional discriminations than price discriminations. Price discrimination is lawful if it can be justified under several exculpatory provisos or has no effect on competition. In contrast, promotional discrimination is illegal per se, irrespective of competitive impact and without resort to statutory justification. *Id.* at 910.

The court went on:

> [Plaintiff's] argument would have us collapse the distinction in schemes and standards and would have us find that the two sections are mere surplusage. This we decline to do. In view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress carefully considered the deficiency in the original law proscribing price discrimination in the supplier-customer sale and drafted §§ 2(d) and 2(e)

to apply exclusively to promotional discriminations like [157] those alleged in this case. *Id.* at 910–11.

Complaint counsel argue that neither *Rickles* nor *Kirby* are controlling here since they are secondary line cases (CRLA, p. 36, n. 33), but I know of no authority for the proposition that, or any logical reason why, "price" should be defined differently in primary and secondary line cases. The court in *Indian Coffee*, agrees. 482 F.Supp. at 1109, n. 11.

Finally, treating reductions in the producer's revenue (such as are caused by RECU redemptions) as price discounts is not dissimilar to the old "mill net" theory.[55] While I have accepted "mill net", or revenue received by the seller, as a price which can be used to analyze the Section 5 charge, this definition of price is no longer acceptable in Robinson-Patman cases. *See National Lead Co.,* 49 F.T.C. 791 (1953):

> . . . the amended complaint, in Count II, alleges that each of the respondents discriminates in the price of its lead pigments as between different purchasers, in violation of section 2(a) of the amended Clayton Act. Certain of the discriminations, it is alleged, occur as a result of the use of the zone method of pricing and selling to competing customers in the same zone. As stated in the conclusion appended to the findings, the Commission is of the opinion that on this phase of the case the complaint fails to state a cause of action. This is because the allegations are that each of the respondents sells its products in accordance with a delivered pricing system, but the alleged discriminations [158] occur as a result of differing net prices received by each of the respondents at its factory. Thus, the complaint does not show that the alleged unlawful discriminations as between purchasers located in the same zone occur as the result of differences in actual prices at which the respondents' products are sold. *Id.* at 881–82.

More recently, in *Kapiolani,* it was argued that Section 2(a) price should be defined as "the amount the seller actually and ultimately receives from the sale, *i.e.,* net receipts rather than money initially paid out by the buyer for the product." 337 F.Supp. at 104. The court rejected this argument, holding that there is no authority to support a "net receipts" approach to Section 2(a). According to the court, price under Section 2(a) means "the actual amount paid to the supplier for the goods furnished." 337 F.Supp. at 104, *citing Corn Products Refining Co.* v. *FTC,* 324 U.S. 726 (1945). And in *Robbins Flooring, Inc.* v. *Federal Floors, Inc.,* 445 F.Supp. 4 (E.D. pa. 1977), the court defined price for purposes of Section 2(a) as "the amount actually paid or laid out for goods by the buyer." *Id.* at 8.

Since neither RECU's nor performance allowances are elements of Section 2(a) price, complaint counsel have not proved that General Foods has, through its Maxwell House Division, discriminated in price in the sale of its regular coffee and the Section 2(a) count will be dismissed.

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[55] Complaint counsel argue that they are not espousing a return to the "mill net" theory since they do not deduct transportation costs (CLA p. 161, n. 570), but their proposed findings on the Section 5 price emphasize that RECU's reduce the Division's revenue: "General Foods sponsors the coupons, absorbing the financial loss" (CPF 3–206). "General Foods, the seller, thus experiences a reduction in the price it receives" (CPF 3–226).

4. Assuming That General Foods Discriminated In Price, It Has Not Established That It Was Meeting Folger's Competition In Good Faith

If complaint counsel's price definition is accepted, the Maxwell House Division's response to Folger's entry injured some of its smaller competitors in Cleveland, Pittsburgh and Syracuse (Findings 255–73), and I do not believe that General Foods could successfully meet its burden of proving that the prices it charged in those cities were offered in good faith to meet the equally low prices of Folger's.

The Division's overall approach to Folger's entry was not to aggress and I believe that it intended not to beat Folger's competition. However, General Foods has a greater burden than [159] proving intent; it must satisfy me with reasonable accuracy that its intentions were carried out, and Mr. MacDonald's reconstruction does not provide that kind of proof, for he did not have personal knowledge of each transaction he charted, and much of his reconstruction was based upon unproven assumptions, such as the times of deal announcements (Findings 500–05). *See Corn Products Refining Co.* v. *FTC*, 324 U.S. 726 (1945):

> The only evidence said to rebut the prima facie case made by proof of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each witness' assumption or conclusion that the price discriminations were justified by competition. *Id.* at 741.

IV. SUMMARY

A. General Foods, through its Maxwell House Division, has sold and is selling regular coffee in interstate commerce and the Commission has jurisdiction over the acts and practices of General Foods which are challenged in the complaint.

B. The relevant market for the production and sale of regular coffee by roasters to wholesalers and retailers is nationwide.

C. General Foods has not, through its Maxwell House Division, attempted to monopolize the production and sale of regular coffee in the relevant market, the HFNI, or in any of its market areas or sales districts, nor has it engaged in any other unfair methods of competition in those areas.

D. The Maxwell House Division's RECUs and performance allowances are not elements of Robinson-Patman price and General Foods has not, through the Division, sold regular coffee to purchasers at different cognizable prices. [160]

V. Order

It is ordered, That the complaint be, and it hereby is, dismissed.

Opinion of the Commission

By Miller, *Chairman:*

I. Introduction

General Foods Corporation ("General Foods") was charged with violations of Section 5 of the Federal Trade Commission Act[1] and Section 2(a) of the Robinson-Patman Act[2] in connection with the marketing of Regular Maxwell House Coffee. The complaint alleged that General Foods—by selling its regular ground coffee below cost or at unreasonably low prices, by engaging in excessive promotional activities, by using a "fighting brand" to impede entry, and by discriminating geographically in prices and promotions—monopolized or attempted to monopolize the sale of regular ground coffee in a national market and in several regional submarkets.

After almost two years of hearings, Administrative Law Judge Lewis F. Parker dismissed the complaint. He concluded that complaint counsel had failed to establish the existence of any submarkets smaller than the United States as a whole. On the national level, and even in the proposed submarkets, he determined that General Foods' market share was too small to admit of a reasonable probability of successful monopolization. He found nothing inherently anticompetitive about a company lacking market power pricing below average variable cost or using a so-called fighting brand in response to competition. The ALJ also rejected the Robinson-Patman Act price discrimination [2] charge, finding that the coupons and performance allowances, which formed its basis, were not elements of price.

Complaint counsel appeal the initial decision on essentially three grounds. First, they urge that the ALJ erred in concluding that the evidence on interregional price variations failed to establish the existence of relevant regional submarkets in which respondent held market power. Second, they contend that sustained sales below average variable cost and selected use of a "fighting brand" to deter local entry and preserve profitability constitute at least unfair methods of competition, if not attempted monopolization. Finally, they argue that certain coupons and performance offers should be calculated as price differences under Section 2(a) of the Robinson-Patman Act.

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[1] 15 U.S.C. 45.

[2] 15 U.S.C. 13a.

For the reasons discussed below, we reject these arguments and affirm the Initial Decision.

II. The Regular Ground Coffee Industry

A. *The Product*

The parties stipulated the relevant product market to be all regular ground coffee packaged for sale at retail, including caffeinated, decaffeinated and extended ground coffee products. This definition excludes instant coffees and institutional sales (those to offices and hospitals, for example), as well as tea and other possible coffee substitutes. [3]

B. *The Major Sources of Supply*

1. General Foods - Maxwell House

General Foods is one of the leading manufacturers of processed foods, with over 30 major brand names in distribution.[3] (IDF 1.) For many years General Foods' Maxwell House Division has been the leading seller of regular ground coffee in the United States, marketing it under the Regular Maxwell House (RMH), Yuban, Sanka, Brim, Max-Pax and Mellow Roast labels. In the most recent twelve-month reporting period in the record, fiscal 1980, the Maxwell House Division accounted for almost 32 percent of national ground coffee sales. Its Regular Maxwell House brand accounted for 22 percent of national sales, drawing most of its strength from the eastern United States. (RX 1279–80).

2. Procter & Gamble - Folger's

The Procter & Gamble Company became the nation's second largest seller of regular ground coffee with its purchase of The Folger Coffee Company in 1963. The Folger's brand was then the best selling coffee in the West, but had limited sales east of states bordering the Mississippi River. (RX 1106.) By fiscal 1980, Folger's had expanded throughout the East and had surpassed RMH to become the leading national brand with 26 percent of [4] sales. (RX 1279–80.) Procter & Gamble also sells a decaffeinated coffee under the High Point label. (IDF 10.)

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[3] The following abbreviations are used in this opinion:

ID – Initial Decision Page Number
IDF – Initial Decision Finding Number
Tr. – Transcript of Testimony Page Number
CX – Complaint Counsel's Exhibit Number
RX – Respondents' Exhibit Number
CAB – Complaint Counsel's Appeal Brief Page Number

3. Copersucar - Hills Bros.

The Copersucar Company is a Brazilian conglomerate that owns the Hills Bros. Company. (IDF 10.) At the close of the record, Hills Bros. coffee was sold in all but the southeastern portions of the nation and accounted for approximately 7 percent of national ground coffee sales. (RX 1117.)

4. Miscellaneous Suppliers

The remaining roughly 35 percent of national sales went to regional roasters' brands and the stores' "private label" brands. (RX 1107.) Among the major regional brands in the East are Savarin, Chock Full O'Nuts (CFON), and Chase & Sanborn (owned by Nabisco Brands, formerly Standard Brands). (IDF 10 and 12; CX 1072.) The private labels, also called "chains-own-brands" (COB) or "controlled group," include Kroger's, Safeway and A&P, among others, and have been more successful in the eastern United States than elsewhere. (Compare Tables 1 and 2 below.) Table 1 presents a year-by-year tabulation of national market shares by brand since 1971. [5]

Table 1

**Market Shares of the Leading
Brands of Regular Ground Coffee
in the United States: Fiscal Years
1971 to 1981***

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981⁺
Total General Foods	29.8	31.2	33.6	34.4	35.1	33.4	32.8	33.3	31.1	31.5	31.9
(Regular Maxwell House)	(24.0)	(24.0)	(24.4)	(24.7)	(25.2)	(23.9)	(24.3)	(24.2)	(22.0)	(22.1)	(21.9)
Folger's	19.1	20.3	21.3	22.4	22.9	22.6	21.6	21.4	26.9	26.2	25.1
Hills Bros.	10.2	9.1	8.0	7.8	8.0	7.4	7.7	6.9	6.7	6.7⁺	NA
Chase & Sanborn	5.1	5.0	4.7	4.1	4.1	3.2	2.3	NA	NA	NA	NA
Chock Full O' Nuts	6.3	6.2	6.0	6.2	6.4	7.2	6.2	NA	NA	NA	NA
Savarin	1.3	1.3	1.2	1.3	1.1	1.3	1.2	NA	NA	NA	NA
Store Brands	14.0	12.4[1]	11.8[2]	11.7	11.0	13.3	17.2	16.9	14.9	14.9	NA [6]

Source: 1971—CX1072A; 1972-1977—CX1072 B-G, and RX 1279-80; and 1980-81—RX 1107A and 1117, 1279-80. Data for Chock Full O'Nuts are taken from the entry in CX 1072A-F for "Closed Group." (*See* CPF 11-13).

* A fiscal year begins in April of the previous calendar year—e.g. fiscal 1971 runs from April 1970 to March 1971.

⁺ Data are for first seven months of the fiscal year.

[1] 13.0 according to RX 1107A.

[2] 12.5 according to RX 1107A.

C. *Competition in the Regular Ground Coffee Industry, 1971–1980*

The events giving rise to this case began with Procter & Gamble's campaign to bring Folger's into the Maxwell House eastern sales area—that portion of the nation roughly east of a line extending from the Illinois/Indiana border on the north to the Mississippi/Alabama border on the south. (IDF 34; CX 1077A.) Procter & Gamble chose Cleveland for its first test in October 1971.[4] Cleveland, where RMH held nearly 45 percent of sales, was one of Maxwell House's most successful markets. (IDF 150, 235.) Procter & Gamble's goal was a sustainable share of 20 percent by the end of the year. (CX 493B & C.)

Folger's employed a marketing mix of media advertising, incentives for retailers' promotions, consumer coupons, assorted in-pack gifts, and home-delivered free samples to introduce its coffee to Cleveland consumers. (Zurcher, Tr. 6226–7; CX 491–499, 528A.) Maxwell House responded with 50 cent mailed coupons to combat Folger's 35 cent coupon, and in-pack coupons beating Folger's inserts by 4 cents to 10 cents per can. Maxwell House [7] also increased its promotional incentives for retailers, but stopped short of giving away samples. (*See* IDF 175.)

In its first year Folger's garnered 15 percent of Cleveland sales, while RMH grew by five share points to 50 percent. (RX 1111–12.) By early 1973 Procter & Gamble detected that General Foods' defensive efforts in Cleveland had subsided, but found that aggressive discounting by Hills Bros. was limiting further gains. Once again, Procter & Gamble increased its consumer coupon activities, began to "compete directly with Hills for [grocers'] feature support," and, as a result, increased its Cleveland share to 18 percent for the last six months of 1973, displacing Hills as the second leading brand. (CX 528B.)

In the Spring of 1972, executives in the Maxwell House Division concluded that Folger's was "disturbingly successful" in Cleveland, and that similar successes could easily recur throughout the East. (IDF 149–155; CX 122.) The Maxwell House division sought authority from General Foods to mount a strong defense to Folger's eastern expansion. According to Maxwell House a so-called "defend now" strategy—immediate discounts, coupons and promotional allowances in each test area—could limit Folger's share in the East to 10 percent, while increasing RMH's market share from 39 to 42 percent. Otherwise, Maxwell House predicted Folger's would ultimately gain 20 percent of the entire eastern region and RMH would decline by 9 share points. (IDF 157, 165; CX 130C.) General Foods concurred in the strategy with two restrictions: sales of RMH were not to fall below reasonably anticipated variable costs, and consumer [8] promotions were not to exceed Folger's levels. (IDF 163–64, 166, 173.)

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[4] Folger had entered some eastern areas prior to its purchase by Procter & Gamble. (CX 11Z–28.) The brand held substantial shares of Cincinnati, Indianapolis and Jacksonville. Procter & Gamble's delay in resuming Folger's eastern expansion was partly the result of a Commission investigation begun shortly after Procter & Gamble purchased The Folger Coffee Company in 1963 and 1967 consent decree which forbade Procter & Gamble from any promotional price discrimination for a five year period. (*See* CX 570D; RX 1106, and *Procter & Gamble Company*, 71 F.T.C. 135, 147 (1967).) Until 1974 Folger avoided the Baltimore/Washington area out of concern for possible Commission responses. (CX 522, 507C; Hunter, Tr. 3085–6.)

In February 1973, 16 months after Folger's Cleveland entry, Procter & Gamble introduced Folger's into Philadelphia.[5] One month later Folger's came to Pittsburgh. In both cases Procter & Gamble emphasized free samples to consumers and discounts to retailers. (IDF 181–85.) The Maxwell House Division responded again with advertising coupons and promotional allowances, matching some, but not all, of Folger's discounts to retailers. (IDF 183.)

Maxwell House also introduced its Horizon brand, which had been developed to appeal to consumers preferring a "milder" blend such as Folger's, into a portion of the Philadelphia district. It was packaged in a can resembling Folger's (CX 109F–H, 115B, 120A.), but failed to have a significant impact. (CX 541B.)

In April 1974, Procter & Gamble noted that two and one-half years after Folger's introduction into Cleveland and just over a year following its Philadelphia and Pittsburgh introductions the brand was "a solid number 2" in each area, but below objectives in the latter areas and "only now approaching the going 20 percent share objective in Cleveland." (CX 528A.) Folger's had [9] gained 9 percent of sales in Philadelphia and 11 percent of sales in Pittsburgh.[6] (CX 651G; RX 1113.)

For its entry into the Syracuse district in the fall of 1974 Folger switched from free samples to retailer discounts and promotional incentives (such as those used by Maxwell House). (CX 538A, B.) Its retailer discounts ranged from four to five times the traditional allowances. Maxwell House did not match Folger's trade deals, and soon discovered the consequences. Retailers offered Folger's at a lower price than RMH. In less than a year RMH dropped from 41.5 percent to 30 percent of area sales, while Folger's captured 27 percent. (IDF 191, 198; RX 1114A.) Not until Maxwell House decided to meet Folger's discounts "dollar for dollar" did RMH sales begin to recover. (IDF 199; CX 1072F.) Nevertheless Folger's was able to maintain roughly 20 percent of the Syracuse area's sales throughout the latter 1970's. (RX 1279.)

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[5] A Brazilian frost in July 1972 was an "overruding [sic] preemptive condition" regarding Folger's decision not to go ahead with a simultaneous expansion ("roll out") of the remaining eastern area at that time. (Hunter, Tr. 3103.)

[6] Procter & Gamble attributed Folger's shortfall in Pennsylvania to several factors. The brand had struggled for the first nine months in Philadelphia, as local retailers sold the coffee as a premium price brand. (CX 521B.) Likewise, Folger's suffered from weak efforts by Pittsburgh retailers to feature the brand in sales. (CX 528B.) In both areas Folger perceived an "unprecedented level of Maxwell House defensive activity," in terms of media advertising and consumer coupons. (CX 528A.) There was also increased competition from local roasters and the store brands. (CX 105D,E.) Finally, both Maxwell House and Folger independently concluded that Folger's sales had suffered from inadequate emphasis on retailer promotions, and repeat-purchase incentives. (CX 105D, 535E, 540D–F.)

In addition to Folger's new sales strategy, Procter & Gamble attributed its "very strong Syracuse progress" to a "less intense [10] Maxwell House defensive activity." (Hunter, Tr. 3075–77; CX 541A–B.) A November 1975 Folger memo concluded:

> We think it is realistic to anticipate similar restrained defensive activity in the remaining northeastern expansion area. We will no longer be testing, so there will be no motivation to cloud our test results and discourage our expansion. Further, Maxwell House will be under considerable economic pressure from the breadth of our introduction into its high share territory. (CX 541B.)

However, Folger's expansion plans into the remainder of the East were suspended when crop damage from a winter freeze in Brazil increased costs and created an unstable pricing environment. (Hunter Tr. 3078; CX 538B.) Folger's "roll out" was begun in October 1977, being completed in February of 1978. (RX 1107B.) The results are displayed in Table 2. [11]

Table 2

Market Shares of the Leading Brands of Regular Ground Coffee in the Maxwell House Eastern Sales Area: Fiscal Years 1971 to 1981

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981⁺
Total General Foods	42.8	43.9	47.6	48.9	49.3	46.4	43.7	44.8	41.4	40.0	39.9
(Regular Maxwell House)	(38.1)	(38.5)	(38.9)	(39.5)	(39.8)	(37.4)	(36.1)	(36.4)	(33.6)	(32.5)	(31.9)
Folger's	5.4	5.8	6.7	8.3	9.3	9.9	10.3	10.7	16.2	17.4	15.9
Hills Bros.	8.6	7.9	6.8	5.7	6.6	6.0	5.9	NA	NA	NA	NA
Chase & Sanborn	9.1	8.6	8.1	6.6	6.7	5.3	3.9	NA	NA	NA	NA
Chock Full O' Nuts	3.4	3.7	3.6	3.9	5.1	5.3	4.1	NA	NA	NA	NA
Savarin	2.6	2.6	2.3	2.4	2.1	2.6	2.4	NA	NA	NA	NA
Store Brands	16.4	14.9	13.5	12.6	12.5	15.3	21.3	NA	NA	NA	NA

[12]

Source: 1971—CX1072A; 1972-1977—CX1072 B-G, and RX 1279-80; and 1980-81—RX 1107A and 1117, 1279-80. Data for Chock Full O' Nuts are taken from the entry in CX 1072A-F for "Closed Group." (*See* CPF 11-13).

⁺ Data are for first seven months.

By fiscal 1980 Folger's accounted for just over 17 percent of sales in the Maxwell House eastern sales area and had become the nation's best-selling brand. (*See* Table 1.) Folger's share of sales in the eight Maxwell House sales districts it entered since October 1971, ranged from just under 12 percent in New York City to just under 22 percent in Syracuse. (RX 1279.) Meanwhile RMH's share of its total eastern area fell from 38 percent in fiscal 1971 to 32.5 percent by fiscal 1980. All General Foods' coffees combined fell from 43 to 40 percent of sales.

D. *The ALJ's Findings*

The ALJ found that following Folger's introduction into Cleveland, RMH was sold there below average variable cost[7] for 4 of 12 consecutive quarters, dropping below unit cost by 1.4 cents per pound (1.6 percent of price) from October 1973 to September 1974. (IDF 384.)

Following Folger's introduction into Pittsburgh, the ALJ concluded, RMH prices dropped below average variable cost for 7 of 8 consecutive quarters, by 7.1 cents per pound (in effect, 9.5 percent of price) from April 1973 to March 1974 and by 2.4 cents [13] per pound (2.7 percent of price) from April 1974 to March 1975. (IDF 385.)

For Maxwell House's entire Youngstown sales district, which contains Cleveland and Pittsburgh, the ALJ found that RMH was sold at a price 2.7 cents per pound (3.5 percent) below average variable cost from April 1973 to March 1974. (IDF 385.) And he found that following Folger's introduction into Syracuse RMH was sold below average variable cost for 7 of 9 consecutive quarters, by 4.3 cents per pound (5.2 percent of price) from October 1974 to September 1975 and by 3.1 cents per pound (2.4 percent of price) from October 1975 to September 1976. (IDF 386; CX 1389.) However, the ALJ found that Maxwell House generally failed to match the levels of Folger's discounts and promotions in each of the areas where RMH was priced below cost. (IDF 175–201.)

The ALJ also found that Maxwell House employed its Horizon brand as a "fighting brand" in Philadelphia and Syracuse. He found that Horizon was introduced, at prices far below average variable cost, solely for the purpose of disrupting Folger's introductory efforts. (IDF 424 to 427.)

The ALJ, nonetheless, found the evidence of below-cost sales insufficient to support liability for an antitrust violation. Maxwell House's pricing in Cleveland, Pittsburgh, and Syracuse could not have been predatory, he found, since Maxwell House had no prospect of driving the experienced and financially strong Folger's out of these areas during the periods of below-cost pricing, and could not block the entry of others during any subsequent periods of recouping profits. (IDF 440.) He [14] concluded that despite Maxwell House's below-cost pricing there was no evidence of intent to monopolize, exclusionary behavior, or a dangerous probability of successful monopolization. (ID at 150.)

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[7] The ALJ adopted complaint counsel's method of computing the relevant revenues and costs. Specifically, he computed net revenue as gross revenue less cash discounts and all product promotions to retailers as well as consumers; he computed variable cost as the sum of the costs of materials (valued at current prices), labor, transportation, warehousing and media advertising, which he expensed in the period incurred; he computed fixed cost as the sum of the costs of selling, plant depreciation, administration and central corporate overhead. (IDF 135–147, 379–413, 415.) For the reasons discussed in Section III.C. *infra*, we cannot accept the judge's findings of below-cost sales in these areas.

III. The Elements of an Attempted Monopolization Offense

A. *Introduction*

The issue raised on appeal under the Sherman Act is whether Maxwell House is guilty of attempting to monopolize interstate trade or commerce.[8] The nature of the charged violations requires us to determine which occurred—rivalry that benefited consumers, or conduct that threatened competition.

Making the distinction necessitates a careful examination of the facts. To err in either direction—either by permitting anticompetitive conduct or by chilling the rivalry that is the essence of dynamic competition—would be to stifle the very competition the antitrust laws are intended to foster.

The Commission recently set out the legal elements of an attempted monopolization offense in *E.I. DuPont De Nemours & Co.*, 96 F.T.C. 653, 725 (1980). Finding the courts to be virtually unanimous on the issue, the Commission has held that a violation consists of three elements:

(1) specific intent to control prices or destroy competition;
(2) exclusionary or anticompetitive conduct; and [15]
(3) a dangerous probability of success.[9]

We consider each in turn, then proceed to an analysis of the facts of this case.

B. *The Intent Element*

To be liable for attempted monopolization, an offender must be shown to possess specific intent to achieve monopoly power by predatory means.[10] As the Commission made clear in *DuPont*, this element is not satisfied by ambitious and aggressive plans to compete, even with the goal of taking business from competitors or vanquishing a troublesome rival.[11] The antitrust laws provide no protection from such designs, where the means to effectuate them amount to no more than vigorous competition.

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[8] The monopolization charge was abandoned on appeal.

[9] 96 F.T.C. at 725. The Ninth Circuit, which, the Commission noted, had appeared to depart from the requirement of a dangerous probability of success, has reiterated the necessity of the third element of the attempt offense. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.* 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982).

[10] *Times Picayenne Publishing Co. v. United States*, 345 U.S. 594, 626–27 (1953).

> Direct evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation.[12] [16]
>
> To conclude otherwise would contravene the very essence of the competitive marketplace which is to prevail against all competitors.[13]

Thus, inherent in the concept of intent is the need to consider the means used to achieve the goals. Moreover, the ambiguities associated with motives, combined with the difficulties inherent in proving subjective state of mind, have further limited the independent significance of the intent element.[14] The Commission has, accordingly, narrowly circumscribed the context within which intent may be considered:

> Intent is a barren issue without consideration of the means contemplated for acquiring monopoly power.[15]

Thus, while essential to a finding of attempted monopolization, the element of intent inevitably entails the element of conduct. [17]

C. *The Conduct Element*

The issue in cases of attempted monopolization that has drawn by far the most attention from adjudicators and commentators is the boundary between permissible aggressive competition and anticompetitive predatory conduct.[16]

While there may be reasonably obvious cases of objectionable means toward monopoly—enforcing a patent fraudulently obtained, for example—most such activities present a difficult task of line drawing. Aggressive pricing is just such an activity.

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[11] *E.I. DuPont DeNemours & Co.*, 96 F.T.C. 653, 726-7 (1980).

[12] *William Inglis & Sons v. ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982).

[13] *Id.* at 1028, n.7 (quoting *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 670 (9th Cir. 1980).) *Accord, Hayes v. Solomon*, 597 F.2d 958, 977 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) (threats to compete, and to drive out of business if necessary in the absence of unfair, anticompetitive or predatory conduct, is not enough . . .); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 273 (7th Cir. 1981) ("We agree with the Fifth Circuit's affirmation in *Hayes* v. Solomon [just quoted] . . ."); *Agreshell, Inc. v. Hammons Products Co.* 479 F.2d 269, 285 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973) (Court attaches little significance to defendants' assertion that plaintiff "had no right" in a market that defendant claimed as "my domain").

[14] *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1113 n.41 (7th Cir. 1982), *cert. denied*, *American Tel. & Tel. Co. v. MCI Communications Corp.*, 104 S.Ct. 234 (1983) (Blaming excessive reliance on the element for burdening litigation and encouraging inconsistent results.)

[15] *E.I. DuPont DeNemours, & Co.*, 96 F.T.C. 653, 727.

[16] *Id.* at 726–38.

Predatory pricing has long been condemned by the courts,[17] while at the same time its anticompetitive potential has been questioned by economists.[18] More recently, debate over the issue has centered around a rule proposed by Professors Areeda and Turner, who advocate that predation be conclusively presumed when a monopolist's price falls below "reasonably anticipated" average [18] variable cost.[19] Conversely, their argument holds that a price at or above that level would prove lack of predatory pricing.

Areeda and Turner reason that no manager trying to maximize the net worth of a firm would voluntarily incur those costs that could be avoided by halting production unless the sacrifice generated future profits above the competitive norm. Simple economic models of the firm suggest that the most likely explanation for such behavior is the expectation that setting price below average variable cost will eliminate enough competition to allow supra-competitive pricing later.[20]

In a dynamic setting, however, where competition involves more than the selection of one product's price and quantity for the current period, both the measurement and meaning of price-[19]cost comparisons can be far more difficult to interpret. An obvious problem is the allocation of joint costs among different products in the multi-product firm.[21] Where a firm produces several brands of a product from the same plants, with the same workers and with some of the same raw materials, the precise allocation among brands of even the variable production costs can be arbitrary.[22] Similar difficulties attend the allocation of costs and revenues related to advertising and promotion that span different geographic areas.

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[17] A classic treatment of predatory pricing is contained in *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

[18] *See, e.g.*, McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. Law & Econ. 137 (1958).

[19] Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). Among the other significant contributions to the commentary, are Posner, *Antitrust Law* 184–96 (1976); R. Bork, *The Antitrust Paradox* 144–60 (1978); the collected articles in *Strategic Predation and Antitrust Analysis* (S. Salop ed. 1981); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979); and McGee, *Predatory Pricing Revisited*, 23 J.L. & Econ. 289 (1980). Calvani and Lynch summarize literature that has become too voluminous to described here. *See* Calvani and Lynch, *Predatory Pricing Under the Robinson Patman and Sherman Acts: an Introduction*, 51 Antitrust L.J. 375 (1982).

[20] While Areeda & Turner speak in their treatise of a monopolist's pricing practices, they also think their rule relevant to attempted monopolization:

> Predatory pricing is a particularly good example, for such pricing is itself proof that the firm, if not already possessing a degree of market power, anticipates obtaining it. Otherwise it would not be able to recoup its losses by monopoly profits earned after the target firms are extinguished. III *Antitrust Law* at 353.

[21] As the Ninth Circuit stated in *TransAmerica Computer Co., Inc. v. IBM Corp.*, 698 F.2d 1377, 1387 (1983):

> The uncertainty and imprecision inherent in determining "costs" counsel against basing conclusive presumptions on the relation between prices and costs. Assessing those relations for the products of a multi-product firm requires allocating known and estimated costs and revenues among various products. While accounting problems do not warrant ignoring cost figures completely, they do make it unwise to rely exclusively on such figures.

See also, George J. Benston, *Accounting Numbers and Economic Values*, The Antitrust Bulletin (Spring 1982), pp 161-215.

[22] The difficulty in allocating respondent's marketing outlays is perhaps best evidenced by a close correlation between sales of instant and regular ground coffee for both Folger and Maxwell House—which means that promotion of one type of coffee can generate revenues for others. (CX 640M.)

Even more difficult is the challenge we face in this case: the allocation of costs attributable to and revenues derived from advertising and promotion over time. Promotional outlays or reduced prices that cause current accounting losses may represent an investment in long-lived information and goodwill that will [20] pay off with enhanced future revenues.[23] If so, the investment component should be amortized over the life cycle for which respondent expected it to endure.[24]

Given the correct measurement of costs and prices, it is possible to find that pricing below average variable cost presents no threat to competition. Substantial discounting or giving away samples may be the most efficient way for a new firm to establish goodwill that might sustain greater sales in the future. Such reductions might also be justified where it is less costly for existing firms to incur current losses than to close and later reopen.[25] These are examples of a general proposition that is already well accepted. As even Areeda recognizes:

> If the market prerequisites for antisocial predation are absent, then prices below cost—however defined—would be serving a different and presumably competitive function.[26] [21]

In short, "price" below "cost"—especially as "price" and "cost" are conventionally estimated—can be an ambiguous signal.

The limitations of the Areeda & Turner rule have not escaped the attention of the courts, where it has gained but qualified acceptance.[27] Judges have recognized the advantage of the rule as providing a more objectively measurable standard to guide pricing decisions than the traditional standards of "unreasonably low," "below cost," or "ruinous competition" that have been employed in the past.[28] However, the trend in court decisions is drawing away from relying on price/cost comparisons as conclusive. Prices above average variable costs raise a strong, often conclusive, presumption of legality. Conversely, prices below average variable costs can raise a presumption of predation, but that presumption is rebuttable.[29]

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[23] *See* Nagle, *Do Advertising-Profitability Studies Really Show that Advertising Creates a Barrier to Entry?* 24 J. Law. Econ. 333 (1981).

[24] The ALJ, in computing General Foods' revenues and costs, treated all such promotional incentives as straight price reductions, without recognizing any investment value. Likewise, he expensed all outlays for advertising in the period incurred and made no assessment of their long-lived effects on consumer goodwill. The record does not support that approach. (IDF 379 to 387: *see* note 52 below.)

[25] Areeda, *1982 Supplement to Antitrust Law* 120–21, 150–2 (1982). Costs of reentry can include investments in goodwill as well as investments in plant and equipment: each can result in several periods of losses before yielding compensating revenues.

[26] *Id.* at 149–50.

[27] *See, e.g., O. Hommel Co. v. Ferro Corp.* 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 102 S.Ct. 1711 (1982) (inclined to accept the basic premise); *Northeastern Telephone v. AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982) (adopting marginal costs); *William Inglis & Sons v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982) (price-cost relationships raise presumptions of legality or illegality).

[28] *See e.g., MCI Communications v. American Tel. and Tel. Co.* 708 F.2d 1081, 1113 (7th Cir. 1981), *cert. denied*, *American Tel. & Tel. Co. v. MCI Communications Corp.*, 104 S.Ct. 234 (1983).

Thus, the courts are leaving one principle undisturbed: low prices alone, including prices below some measures of variable [22] cost, do not by themselves mean the seller has violated the antitrust laws.

D. *The Dangerous Probability Element*

The third element of the attempted monopolization offense is the dangerous probability of success. However objectionable the intent or conduct may be, there must also exist a dangerous probability that the defendant will achieve the power to control price or exclude competition in the alleged market(s).[30] The courts have attempted to quantify the probability of success by measuring the market share of the alleged offender. Market shares in the range of 40 to 60 percent, if corroborated by other evidence, have been found close enough to monopoly to support an [23] inference that success was dangerously probable.[31] Nevertheless, the decisions have consistently held that market shares standing alone, even in this range, do not provide an adequate springboard to monopoly.[32]

The Commission is on record as rejecting a narrow marketshare approach:

> [O]ur disposition of this matter should not depend on a showing that DuPont's market position exceeded some magic market power (as measured by market share) criterion.[33]

The test for market power depends on all the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few. Accordingly, courts view evidence on the dangerous probability of success "as a whole" to determine "the firm's actual or threatened impact on competition [24] in the relevant market."[34] The Commission will follow this precedent.

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[29] *See* Calvani and Lynch, *supra*, note 19, at 306; *see also* Hurwitz and Kovacic, *Judicial Analysis of Predation and the Emerging Trends*, 35 Vand. L. Rev. 63, 113–39 (1982).

[30] Within the range from pure competition to unfettered monopoly, it is necessary to define that degree of freedom from competitive pressure which amounts to legally cognizable monopoly power. The Supreme Court has held that the requisite power must be substantial:

> [W]e have monopolistic competition in every non-standard commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly.

United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 393 (1956) (footnote deleted).

On the other hand, the Court has noted that one need not possess "unfettered power to control the price" of goods or services to cross the illegal threshold. *United States v. Grinnell Corp.*, 384 U.S. 563, 574 (1966).

[31] *E.g., Kearny & Trecker Corp. v. Giddings & Lewis, Inc.* 452 F.2d 579, (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972) (33 percent, with patent, "impressive").

[32] *E.G., Lektro-Vend Corp. v. Vendo Co* 660 F.2d 255, 270–71 (7th Cir. 1981) (33 percent, without entry barriers, insufficient); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) (54.5% dropping to 33% insufficient); *United States v. Empire Gas Corp.*, 537 F.2d 296, 305 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (50% insufficient).

[33] *E. I DuPont de Nemours & Co.*, 96 F.T.C. 653, 726, n.16 (1980).

E. *Our Analytical Approach*

As our review of the legal elements reveals, most of the purported improvements to the law of attempted monopolization have not involved rejection of basic rules. Rather, the evolution of the law has advanced through their clarification.[35]

Cost-based rules of conduct are not new, but the developments inspired by the Areeda & Turner proposal have permitted a more consistent and logical application of the standard for conduct in predatory pricing cases. Intent remains an element of the offense, but the capricious condemnation of any strategy to succeed has ended. Similarly, recent improvements in our understanding of competition have provided the setting for proposals to refine the analysis of competitive effects.[36]

Nevertheless, an explicit methodology has failed to emerge from the decisions dealing with alleged attempts to monopolize. The reported cases show as many starting points as there are [25] elements. Some courts have begun with intent.[37] Others, eschewing the intent element as an unreliable signal, have commenced with conduct.[38] The Commission, however, is among those tribunals that have approached attempted monopolization by addressing the probability of success before proceeding to the other two elements.[39]

Our approach is guided by two related objectives: the desire to improve the accuracy of our decisions and the concern for efficient use of prosecutorial and adjudicative resources.

Improvements in the efficiency of enforcing a rule need not sacrifice the accuracy of adjudication. Indeed, it is possible to enhance simultaneously the confidence in and efficiency of decision making by observing some basic priorities. Where the allegations raise a number of issues, the inquiry should focus first on those that may permit an early and efficient resolution of the case.

For potentially complex predatory pricing cases, this principle suggests certain possibilities for preliminary consideration. The evidence may be clear and free of ambiguity [26] with respect to a particular element. It may become readily apparent, for example, that the alleged predatory price remained above the relevant measure of cost. Alternatively, there may be a complete failure of proof with regard to intent or effect. Accordingly, it is appropriate, as a preliminary test, to seek satisfaction that the record contains sufficient evidence at least to raise material questions with respect to all issues.

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[34] *Lektro-Vend Corp. v. Vendo Co., supra,* 660 F.2d at 271, quoting *Kearny & Trecker Corp. v. Giddings & Lewis, Inc., supra,* 452 F.2d at 598.

[35] *See e.g.,* Areeda & Turner, *supra,* note 19 at 709–13; Posner, *supra,* note 19; Joskow & Klevorick, *supra,* note 19.

[36] *See e.g.,* Posner, *supra,* note 19 at 182–96; Areeda & Turner, III *Antitrust Law* 353–54 (1978); Joskow & Klevorick, *supra,* note 19.

[37] *See, e.g., William Inglis, & Sons v. ITT Continental Baking Co.,* 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 58 (1982); *United States v. Empire Gas Corp.,* 537 F.2d 296 (8th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977).

[38] *See, e.g., Chillicothe Sand & Gravel v. Martin Marietta Corp.,* 615 F.2d 427 (7th Cir. 1980); *Northeastern Tel. Co. v. American Tel. & Tel. Co.,* 651 F.2d 76 (1981), *cert. denied,* 455 U.S. 943 (2d Cir. 1982).

[39] *E.I. DuPont de Nemours & Co.,* 96 F.T.C. 653 (1980). *See Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255 (7th Cir. 1981); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.,* 614 F.2d 832 (2d Cir. 1980).

If a more detailed factual inquiry is required, the next step should be to examine the competition in the alleged market. It may be relatively clear, for example, that resources of the alleged predator are no match for the endurance of its competitors. Only if the examination confirms the vulnerability of a market to predation should the inquiry proceed to the conduct and intent of the alleged predator, the final steps of the analysis.[40]

This approach shares the advantages of narrowing the initial inquiry and perhaps most importantly, starting out on ground well suited to the kind of objective analysis familiar to the [27] Commission. A methodology grounded in analysis of competitive effects promises simultaneously to reduce the probability of incorrectly condemning vigorous competition and to save the time and resources that might otherwise be wasted on an unfocused inquiry. The more elusive assessment of conduct and intent can be avoided where no dangerous probability of successful predation is present. Moreover, the prohibited conduct and intent, as we have stated, are firmly rooted in the expectation of success. Thus, where a high probability is found, the analysis of these elements can proceed on a much firmer basis.[41]

IV. The Attempted Monopolization Charges

At the outset we note that this record does not reveal any obvious grounds for preliminary disposition. Evidence of each material fact is genuinely disputed. Accordingly we shall proceed to an assessment of

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[40] Areeda & Turner describe this approach as an "intermediate position" in their treatise:

> An intermediate position would seek to identify easily proved facts without which predation is most unlikely to occur and then to address such facts before the antitrust tribunal is forced to embark upon the complex inquiry into price-cost relationships. III *Antitrust Law* at 354.

Joskow & Klevorick call the first step a "structuralist approach" although the inquiry they describe goes far beyond the simple concentration calculations typically associated with the "structural" approach, *supra* note 19 at 219.

[41] The basic approach of proceeding from the competitive setting to the challenged conduct has been standard in other antitrust adjudications. The prevailing characterization of the monopolization offense calls for a two stage analysis: first determining the existence of monopoly power, and then examining for the exercise of it. Joskow & Klevorick, *supra*, note 19 at 265, citing *United States v. Grinnell Corp* 384 U.S. 563 (1966). Similarly, in merger cases market definition is a necessary first step of the competitive analysis. *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974). Examination of the strengths and weaknesses of competition in markets affected by a merger focuses the competitive analysis and reduces the uncertainty of drawing the correct conclusions. *See generally*, Joskow & Klevorick, *supra*, note 19 at 213-269.

Maxwell House's prospects of success in monopolizing the alleged markets. [28]

A. *Definition of the Relevant Market*

To determine whether a firm has the means to raise price and maintain it above a competitive level, *i.e.* monopoly power, antitrust analysis generally begins with the definition of the relevant market. According to complaint counsel, the relevant market in this case consists of Maxwell House's individual sales districts—areas roughly centered around metropolitan areas such as Cleveland, Pittsburgh, Philadelphia and Syracuse.

The Commission, in previous cases has made clear what kinds of evidence we consider most valuable in the definition of a relevant market. Most direct, but rarely available, are reliable measures of supply and demand elasticities.[42] Of the indirect evidence, especially probative is the level of entry barriers surrounding a market.[43] We also have recognized the inferential value of evidence revealing price disparities, transportation costs, and transshipments between locations, as well as the perceptions firms have about the competitive threat posed by outsiders.[44]

With regard to entry barriers, we find the record consistent and clear. There is virtually no support for the contention that significant economic boundaries exist among the sales districts alleged to be relevant markets. Evidence on transportation [29] costs, shipping patterns (including transshipments), and the perceptions of competitors all point to markets that reach far beyond the geographical divisions Maxwell House drew for the purpose of marketing coffee. Perhaps most persuasively, the record shows repeated examples of successful entry by other firms into district after district. By comparison, the evidence on which complaint counsel rely to prove markets and monopoly power—price disparities, profits, advertising and product differentiation—is ambiguous and incomplete.

1. Evidence of Transportation Costs and Shipping Patterns

There is no dispute over the insignificance of transportation costs, compared to the value of the product in this case. For example, from 1971 to 1977 transportation costs for all Maxwell House Division ground coffee averaged 1.2 percent of wholesale price for distances of 500–1,000 miles, 2.2 percent for distances of 1,000 to 1,500 miles and 3.7 percent for distances exceeding 1,500 miles. (RX 1224.) On average, the transportation cost for all distances amounted to 1.2 percent of retail price. (RX 1224.)

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[42] *The Grand Union Company*, III Trade Reg. Rep. (CCH) ¶22,050 at 22,703 (1983).

[43] Federal Trade Commission, *Policy Statement on Horizontal Mergers* (June 14, 1982).

[44] *See Id.*

That transportation costs imposed no more than trivial burdens, even on long distance shipments, is reflected in the shipping patterns of the major manufacturers. Maxwell House produced coffee at only four plants, located in New Jersey, Florida, Texas and California. (IDF 105.) Shipments from those plants were not confined to their surrounding areas; the Florida facility produced 50 percent of the RMH distributed in the United [30] States, 60 percent of all ground coffee, and 100 percent of the Max-Pax brand (IDF 106, 107.) Mellow Roast was produced only in New Jersey and distributed nationally. Maxwell House's other coffee brands traveled equally far. (IDF 108.)

Folger's has only three regular coffee plants—in California, Louisiana and Missouri. For its entry into the East, Folger's added no new capacity, (IDF 111.), and there is no evidence that transportation costs figured in its selection of any specific targets.[45]

Hills Bros. used two plants, and sometimes only one, to produce coffee shipped coast to coast. (IDF 114–15.) Chase & Sanborn had been shipping to all its sales areas from only one plant, in New Orleans, since the early 1970's. (IDF 113.) Even the tiny Euclid Coffee Company of Cleveland serviced accounts in several of respondent's sales districts—in Ohio, western Pennsylvania, western New York and throughout the State of Michigan. (Repak, Tr. 2602.) Presented with similar evidence in a recent case, the Commission rejected regional geographic markets.

> The test for measuring geographic market is where consumers (in this case retailers) can practicably turn for an alternative source of supply. Here the record is clear that frozen pizza manufacturers could sell virtually throughout the United States from a single plant with no significant cost disadvantage. Thus, the power of any given group of sellers serving a city or region at a given time to raise prices is limited by the capacity of virtually all other domestic manufacturers to compete on practically an equal footing in that [31] city or region—an economic situation which requires a finding of a national market and the elimination of geographic submarkets.[46] [citations omitted.]

The record also reveals patterns of transshipment and trade flow that belie the existence of significant barriers separating the markets complaint counsel attempt to prove. Trade flow is the shipment of product from a retailer or wholesaler's warehouse located in one sales district to a retail outlet located in another, while transshipment is the cross-district movement of product among warehouses.[47] (L. Nelson, Tr. 5729.) Such movements are evidence of arbitrage, prompted by price differences that offer profits from the shipment of low price coffee among regions.

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[45] Complaint counsel's witness, H. Michael Mann, testified that transportation costs are "negligible" in terms of the optimal location of roasting plants. (Tr. 5568–72.)

[46] *Pillsbury, Inc.* 93 F.T.C. 966, 1030 (1979).

[47] Transshipping is not only done by the grocery trade, but there are people that we have referred to as "bandit brokers". . . . They know what the going trade [rate] is, and they can buy that coffee in that area and still pay the freight and make a profit on it. (Salesman, Tr. 5934–5).

Trade flow had been a problem for RMH before Folger's entry into the east. (CX11–Z18.) Maxwell House referred to the Boston, New York and Philadelphia sales districts as "the complex" because beginning in the late 1960's trade flow made it difficult to limit deals to retailers to just part of the area. The complex has grown in recent years to include part of the Syracuse district and now runs from Maine to Virginia. (IDF 103, J. Mann, Tr. 6454–5; L. Nelson, Tr. 5730–1; *see also,* CX 705B.) With similar problems throughout the East, Maxwell House took [32] such cross-district product movement into account when structuring its promotional incentives in each district.

Neither Folger's nor Maxwell House was immune from arbitrage as Folger's moved east. Soon after coming to Cleveland, Folger's impact on supply began to spread beyond the areas in which it was introduced. Folger's coffee appeared on the shelves in Kroger's and several independent stores in Pittsburgh as a result of "spill-over from [the] Cleveland" trade.[48] (Cleveland and Pittsburgh are alleged to be in separate markets, although both are in Maxwell House's Youngstown sales district.) (CX 919F; Zurcher, Tr. 6288.) Similarly trade flow required Folger to offer the same promotional allowances in Cincinnati and Columbus—two areas outside the Youngstown district—that it offered coffee retailers in Cleveland. (Hunter, Tr. 3094–5; CX 497A; *see also,* IDF 101, 104.)

The Maxwell House Division's response to Folger's entry into both the Philadelphia and Syracuse sales districts was constrained by the prospect of trade flow. (CX 105E, 192F, 634C, 63–Z11, 705B.) In Philadelphia, fears that discounts would spread throughout the eastern complex kept Maxwell House's promotions and discounts much smaller than Folger's. (CX 649F; Laster, Tr. 6982.) Maxwell House at first took the risk of allowing higher shelf prices than Folger's in Syracuse, rather than seeing discounted RMH cut into sales in other districts. (CX 649G.) [33] When substantial sales losses prompted a price reduction in the Syracuse district after all, fears of trade flow problems were confirmed. (IDF 99.) Maxwell House had introduced a fresh-lock lid in that area for monitoring purposes, and cans with the new lid showed up in significant quantities as far West as Portland and Los Angeles and as far south as Jacksonville. (Salesman, Tr. 5933–6; *see also,* Keller, Tr. 6584–6.) Folger's, which had chosen to do its test expansion in Syracuse partly in order to avoid trade flow (CX 539B), also experienced transshipment out of that area. (CX 541A-B.) Overall, the record shows a trend towards increased trade flow and transshipment throughout the East in the period following Folger's 1975 entry into Syracuse. (J. Mann, Tr. 6450–51, 6462–4; IDF 98–104.)[49]

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[48] Retailer coupons, which can be limited more effectively to specific geographic areas, were used more extensively in the Youngstown sales district than elsewhere. (See *CX* 86H, 87C, 89B, 187Z, 710A.) Their use in Cleveland failed to prevent arbitrage.

The implication of this evidence is inescapable. If an economic barrier exists between any domestic coffee producer and any other producer's marketing area, that barrier is not distance. The cost of transportation is unlikely to deter either a producer of ground roast coffee or a reseller, no matter where [34] located, from considering profitable opportunities in distant regions. Accordingly, the putative monopolist of a sales district must look beyond transportation costs for the insulation from competition that permits monopoly power.

2. Evidence of Price Differentials

Complaint counsel claim there are other signs of entry barriers that outweigh the evidence of shipping patterns. The best indicators of geographic markets, argue complaint counsel, are price differences among regions. (CAB 9–13.) We recognize that significant, persistent differences can indeed be persuasive. However, the quantity and quality of evidence showing price differences on this record is far from substantial.

First, as the ALJ observed, the record is virtually devoid of any evidence on the overall wholesale or retail price of regular ground coffee. As a result, definitive comparisons among brands or across areas are impossible. The only company for which cross-district price data are offered is Maxwell House. Even there, however, actual transaction prices at which Maxwell House sold coffee were not introduced. Rather, Maxwell House's prices were calculated by deducting from total annual revenues, cash allowances and expenditures for allowances and promotions *other than* advertising. (CX 1081.)

This method of calculating prices results in some level of distortion because some consumer promotions and trade incentives have both price-reducing and advertising effects. A year-by-year comparison of RMH prices in the Youngstown district with those in [35] the Syracuse district between 1971 and 1977 illustrates this problem. If price is calculated by deducting the cost of all retailer and consumer incentives from gross revenues, the price differences between the two districts range from 2.6 percent of price in one year to 18.1 percent of price in another. (CX 1081.) If only non-performance retailer incentives (those requiring no advertising or display function) are deducted, the range is from 0.2 to 10.8 percent of price. (RX 1141A, 1142A; Elzinga, Tr. 9464.)

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[49] Although Maxwell House was able in some instances to mitigate trade flow problems by assigning prices according to historical resale patterns among areas (Keller, Tr. 6670–71), there is no evidence of any such ability to control the prices of transshipped coffee by the wholesale arbitragers (colorfully called "bandit brokers"). (*See* Salesman, Tr. 5934–5, J. Mann, Tr. 6468–9.) Moreover the very reluctance to reduce wholesale prices in some areas for fear of trade flow into others is itself inconsistent with a complete ability to prevent trade flow from equalizing prices among areas. For example, the Maxwell House response to Folger's Philadelphia entry was constrained by fears that wholesale price reductions there would spread to the New York, Boston, Baltimore and Washington areas owing to "trade flow throughout [the] eastern complex." (CX 705B.)

Complaint counsel argue that deducting both performance and non-performance incentives from total revenues gives a more accurate calculation of price. Respondent contends that performance incentives should not be deducted, as they are not price reductions, but promotional costs. Neither party offers sufficient evidence to support either extreme.[50]

Second, to find that a specific area is a separate market there must be a demonstration of the ability to *raise* prices above those prevailing in contiguous areas without attracting substantial entry. Complaint counsel offer no evidence of any such ability by respondent or any other roaster in the alleged markets. At best, their evidence suggests the ability to lower **[36]** prices in periods of intense price competition below those of surrounding areas. For example, both before and even, more significantly, after the alleged predation in the Youngstown district, the wholesale price of RMH (as calculated by complaint counsel) was lower than in the contiguous districts and than the average price for the nation as a whole. (CX 1081.) Thus, Maxwell House's prices were, on average, the lowest in Youngstown of any of its eastern districts, despite the fact that it was in Youngstown that Maxwell House had the largest market share. (RX 1279–80.)

Third, leaving aside the issue of which costs to subtract and how much, we have just described the transshipping and trade flow that occurred repeatedly during Folger's expansion to the eastern regions. One would expect outbreaks of transshipment when price differences between regions were large, and this is indeed what happened here. Substantial reshipment will tend to reduce or even eliminate such differences, as the retail trade in the higher-price areas buys coffee from the trade (retail or wholesale) in the lower-price areas.

The average revenue figures offered by complaint counsel, which were taken from Maxwell House's records, do not account for those trades. Some quantities of lower-price coffee that were reshipped to higher-price areas are erroneously attributed in complaint counsel's evidence to the lower-price area. Accordingly, prices that were actually paid by the retail trade in the allegedly high-price areas are overstated (and quantities understated), while the opposite holds in the alleged areas of [37] predation. It is impossible to determine the extent to which reshipments caused the actual price prevailing in an area to vary from the calculated average revenue on Maxwell House's books.[51] Most likely the effect was the greatest when the revenue figures show the largest disparities, because that's when incentives to reship are at their peak.

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[50] There is no dispute that Maxwell House enforces the requirement that retailers provide services in order to obtain a performance allowance. (IDF 462-474.) The question concerns the extent to which some allowances may exceed the cost of performances. No direct evidence was offered on this issue. (IDF 464.) Thus, we cannot justify allotting any specific portion of the allowances to price reductions. Complaint counsel's argument, that none of the cost of performance be considered, is clearly contrary to the evidence.

For these reasons we must agree with the ALJ's findings on the meaning and relevance of the price comparisons to the geographic market. With insufficient evidence of overall ground coffee prices or of supra competitive RMH prices, with price differences that change substantially between respondents' and complaint counsel's calculations, and with the failure of the evidence to account for arbitrage, the price data in this record are "so complex and ambiguous that [they are] of little practical utility in resolving the issue of relevant geographic market." (IDF 130, citing Elzinga at Tr. 11,992.)

3. Evidence of Product Differentiation

Complaint counsel contend that product differentiation—by respondent and by others—erected cross-district entry barriers. Specifically, they argue that different levels of [38] product promotion and consumer acceptance among the competing brands constitute barriers that establish each sales district or specified area therein (*e.g.*, the Cleveland and Pittsburgh portions of the Youngstown district) as a separate market. (CAB 16–19.) The argument suffers both from logical inconsistences and a basic misunderstanding of entry barriers.

The contention that product promotion can create differential brand preferences among areas runs squarely into the claim that advertising and promotion are expensable items that should not be amortized over extended periods of time. If promotional effects are quickly dissipated, then advertising should not delay entry or raise entrants' costs above those of established firms. Each firm presumably would begin from the same position, with no goodwill remaining from prior promotions, at the start of each period. If the claim is that the effects are only gradually dissipated, which finds more support in the record,[52] then complaint counsel's price-cost calculations [39] erroneously expense advertising in the year incurred and overstate the relevant costs.[53]

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[51] Complaint counsel commissioned a study of the extent of trade flow for all grocery products combined among Maxwell House's sales districts in calendar 1971 and 1973. (CAB 14.) (IDF 73–84, CX 1029A-C; Lysaker, Tr. 1762, 1795.) Since it ignores transshipping, does not break out coffee flows and does not cover the period after 1973 in which both trade flows and transshipping of RMH and Folger's were increasing, we must agree with the ALJ that it tells us little about the actual extent of arbitrage of coffee across districts as Maxwell House responded to Folger's entry.

[52] The record in this case distinctly reveals an investment component in the costs of advertising and promotion. Respondent expected the benefits from its advertising and promotional defense to occur over a period of many years. (IDF 157–171.) For example, a memo dated seven months after Folger's initial expansion into the East from the Maxwell House president to the General Foods executive in charge of that division indicated the expectation that respondent's defensive efforts would generate additional costs over a two-year period and additional benefits over a subsequent three-year period. (CX 130 F,G.) Other Maxwell House documents utilize a ten-year period for estimating the benefits of stepped up advertising and promotional outlays. (IDF 168; RX 518 C-E; CX 640 M, 636Q.)

Accepting that real or perceived differences among products can build a loyal following of consumers does not amount to an acknowledgement of entry barriers. There is no dispute that the effective use of every element of the "marketing mix"—including the maintenance of consistently desirable product quality as well as the selection of a proper balance of the various types of advertising and promotion—contributes to the identity and success of a brand. Indeed, a company may reap the benefits of both marketing as well as superior quality by charging retailers a higher price than its less successful competitors. (*See* below, Section IV.C.) But, in and of itself, this fact is no more a barrier to entry than the requirement that every coffee producer must make an efficient investment in plant and equipment and must roast an acceptable mix of green coffee beans in order to remain profitable. We cannot accept product differentiation and price disparities as entry barriers without an explanation of how product differences bar entrants. The question is whether product differentiation imposes substantial non-recurring outlays that raise the threshold entry level of potential competitors so high as to enable respondent and/or any of the established firms in any of the alleged markets to [40] restrict output and raise prices for a significant period of time.[54]

We can find no substantial evidence of any non-recurring costs of advertising and promotion that enabled respondent or any of the established firms to raise consumer prices in any of the alleged markets without attracting significant entry. As we have found, Folger's sales responded immediately and dramatically to introductory promotions. In fact, Folger was able to achieve nearly 3 percent of sales in both the Charlotte and Atlanta districts with minor marketing efforts. (CX 539C-D, 1072F; RX 1107A.) Numerous local store brands were able to take hold and compete in each area with minimal marketing efforts. In Philadelphia, during the intense competition following Folger's entry, store brands doubled their sales share to just over 30 percent of the total in four years. (CX 1072 D,G.) For the entire Maxwell House eastern sales area, the sales share of those brands grew from less than 15 percent in 1972 to just over 21 percent in 1977—a 40 percent gain. (Table 2.)

Moreover, the record reveals that changes in the relative intensity of promotion among coffee brands did not insulate any of the established firms from the threat of entry. Rather, such changes resulted in sharp and sudden swings in sales shares among them. (*See* below, Section IV. B.2. & C.) In short, support for [41] a connection between product differentiation and entry barriers is lacking in this record.

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[53] The relevant costs would be understated if, contrary to the record, (*Compare* RX 1141A and B, RX 1142A and B.) there had been a heavy increase in respondent's promotional outlays before Folger's entry and a reduction thereafter. The record shows no such attempts to anticipate Folger's introduction by heavy investments in advertising.

[54] As Posner succinctly defines it, an entry barrier is a "condition that imposes higher long run costs . . . on a new entrant than are borne by competitors." *Antitrust Law* 59, (1976).

4. Actual Entry

The failure of the record to establish entry barriers into Maxwell House's eastern sales districts suggests that the evidence might show instances of successful entry. Indeed, that is so, with the most obvious example being Folger's, whose successful entry into the alleged markets precipitated this case. In addition, both Chock Full O'Nuts and Savarin were expanding into the Pittsburgh portion of the Youngstown sales district as the record was closed. Indeed, Chock Full O'-Nuts, which was expanding generally throughout the East, extended its distribution to include the entire Syracuse sales district where it increased its share of sales from 3 percent in fiscal 1971 to 10 percent in fiscal 1980. (CX 1072A; RX 1278; Salesman, Tr. 5993; CPF 11-13 identifies Chock Full O' Nuts as "Closed Group" in CX 1072A.)

There was also significant entry before 1971. The most notable example came in 1962, when Hills Bros. Co. began a marketing campaign to enter the eastern sales regions of RMH. Like Folger nine years later, Hills Bros. began within Cleveland. General Foods responded there, and in every other area Hills Bros. entered, with stepped up promotional and advertising expenditures on its RMH brand. (CX 11-Z118.) In spite of these efforts, which spawned rounds of general discounting, Hills Bros. first-year penetration of each of the [42] five areas it entered from 1962 to 1967—Cleveland, Pittsburgh, Syracuse, Boston and Philadelphia—exceeded 10 percent. (CX 8-Z48, 11-Z144, 1070 G-H.) According to the 1967 Maxwell House "marketing plan":

> Hills has probably become a major factor . . . for the foreseeable future. . . . If [they are] willing to spend in future introductions as they have in Boston, it will be extremely difficult for RMH to prevent them from becoming a major market factor (*i.e.*, over 10 percent share). (CX 8-Z47.)

As of fiscal 1971, the year preceding Folger's entry into the Cleveland area, Hills Bros.' shares of Maxwell House's sales districts stood at 10 percent in Boston and Philadelphia, 16 percent in Youngstown (Cleveland plus Pittsburgh) and 17 percent in Syracuse. (CX 1072A.) Hills viewed its eastern expansion as successful (Toy, Tr. 2130.), as did Maxwell House. A Maxwell House memo dated October 1971 reviewed the "results" of Hills' eastern expansion just as Folger's was starting its entry into the Cleveland area:

> Significantly, Hills has been able to maintain respectable shares in all of the eastern areas, except for the New York district. This could certainly provide ample encouragement for Folger's—especially in view of the fact that Hills is strictly a coffee company, with considerably less in the way of resources or marketing expertise than Folger's or its parent, Procter and Gamble. (CX 642B.)

Such expansion left a distinct impression on manufacturers as well as retailers. They perceived the eastern sales districts [43] as vulnerable to the entry of the other roasters, especially Folger.[55]

It is clear, therefore, that the eastern sales regions alleged by complaint counsel to be distinct markets—Cleveland, Pittsburgh, Philadelphia and Syracuse—had experienced significant entry before Folger's successful introductions there. In addition, there was substantial expansion of local and regional roasters following Folger's entry. As the ALJ, concluded, all this taken together is "convincing evidence that the Maxwell House Division could not exclude competitors from" the eastern sales areas. (IDF 321.)

5. Conclusion

In conclusion, virtually every characteristic of the market for ground roast coffee contradicts complaint counsel's contention that barriers to entry exist in the eastern sales districts of RMH. The low cost of transportation put every area in the country within the economic reach of a single production plant. Price disparities between areas prompted the transshipment of coffee from discounted regions to premium-priced locations. Two major brands, Folger's and Hills Bros., [44] successfully entered each of the areas in which attempted monopolization is alleged. Folger's became established in some areas with minimal promotional support. Regional roasters and supermarket chains also entered some areas and successfully expanded their shares of sales in others. Thus, the evidence upon which we typically rely to define relevant markets indicates that those markets are larger than complaint counsel claim they are.[56]

B. *Indices of Monopoly Power*

A firm whose unilateral output decisions substantially affect the prevailing price of a product is said to possess monopoly power. If such a firm restricts its output, the result will be a permanent increase in price. This can only happen if other firms do not respond by expanding their output to make up the shortfall. If, however, other firms do respond to attractive prices and fill in the shortage, there is no monopoly power.

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[55] The testimony of the head of Maxwell House's Youngstown district (which includes Cleveland and Pittsburgh) may be most descriptive:

> The Cleveland trade said that they [Folger's] are coming in and they are going to take number one—the number one coffee and the number one brand at our expense. . . . (Zurcher, Tr. 6293.)

[56] Complaint counsel do not allege attempted monopolization in any market larger than a sales district. Lacking such an allegation, we are constrained on review from finding that respondent attempted to monopolize some larger market.

Complaint counsel rely on evidence we have not yet addressed to argue that Maxwell House possessed or could attain monopoly power in certain of its sales districts. While our findings with respect to relevant markets cast serious doubt on whether monopoly power can be shown in the sales districts, the **[45]** possibility remains.[57] Therefore, we will review the allegations going directly to Maxwell House's monopoly power.

1. Market Shares

Complaint counsel point first to Maxwell House's high sales shares in the alleged markets. Maxwell House accounted for the largest portion of sales in each of these districts, with shares exceeding 40 percent during the period. Such high shares, according to complaint counsel, establish that Maxwell House possessed market power. If not already within its grasp, the successful monopolization that can break the law was dangerously close to Maxwell House's reach. (CAB 19-20, 44-45.)

While the definition of monopoly power has gained general acceptance among legal and economic practitioners, the measure of that power has not. The gauge most frequently used has been the market share that firm commands. This measure has the advantage of being easily quantifiable, albeit after the appropriate units of account (revenue, volume, capacity, etc.) have been determined and the relevant markets (geographic and product) have been drawn. The disadvantage is that this gauge does not directly measure market power, but is at best a rough proxy for it. That proxy has been increasingly questioned on both theoretical and **[46]** empirical grounds for its correspondence to actual monopoly power.[58]

At best a high market share can be said to be a necessary but not a sufficient condition of monopoly power, since it is unlikely that a firm with a small share can affect market output and price significantly by adjusting its own output. Even with a large market share, however, a firm cannot safely presume that its own attempts to restrict output will go unanswered by competitors in the market or potential entrants outside the market. Thus, as we have already noted, market concentration indices standing alone, tell us little about competition or monopoly power.[59]

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[57] A firm, for example, may possess market power throughout a market that completely encompasses an area incorrectly identified as the relevant market.

[58] A critical review of economists' attempts to document the correspondence can be found in Goldschmidt, Mann & Weston, Industrial Concentration: The New Learning (1974). *See also Ethyl Corp.*, D. 9128 (Dissenting Opinion of Chairman Miller), *rev'd sub nom. E. I. Dupont de Nemours & Company*, Docket Nos. 83-4102, 83-4106 (2d Cir. Feb. 23, 1984).

Our previous discussion of the relevant market undermines the competitive significance of complaint counsel's evidence on market share within a district. Since, as we have found, the relevant market is larger than a sales district, a firm with as much as 100 percent of the sales in a district could still lack monopoly power. This is because it is inherent in our finding as to the relevant market that customers in the district have access to suppliers outside it. The record reveals that this is true with respect to the Maxwell House eastern sales districts. [47] Retailers have access to supplies from roasters, wholesalers and warehouses outside each area.

A more fundamental flaw further diminishes the utility of evidence on market shares here. Even supposing insuperable barriers to entry by new firms, the existing firms' shares of sales in each district do not reveal the full pressure they exerted on Maxwell House or any other producer. No less important than current shares is the ability of the competition to augment its output in response to a price increase. This ability derives from the productive capacity of competing firms, not merely their current production. Sales may sometimes serve as a proxy for capacity, but when the relationship between sales and capacity breaks down—for example when production falls short of capacity or a firm outside an area ships in only a portion of its production—current sales shares lose their significance.[60]

Excess capacity has haunted the coffee industry throughout the 1970's. (*See* above, Section II.A. and IDF 22.) With each individual sales district accounting for a minor portion of sales, undoubtedly the national firms and probably the larger regional firms could expand their shipments enough to serve every [48] customer in any sales district.[61] For the major firms like Folger, doubling sales in one district while entering others was accomplished without building new plants. Under these circumstances, it is doubtful whether market shares, however measured, can yield any useful information about the monopoly power of a firm or the probability of achieving it in any of General Foods' sales districts. **[49]**

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[59] *See* section IIID, *supra.*

[60] This principle has been recognized in both the courts and the commentaries. *See e.g., United States v. General Dynamics Corp.*, 415 U.S. 486, 502 (1974) ("A more significant indicator of a company's power effectively to compete [than its sales] lies in the state of a company's uncommitted reserves [*i.e.* capacity]"); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 963-64; Areeda & Turner, II *Antitrust Law* ¶523a (1978).

[61] The fate of the smaller roasters provides some indirect evidence of their immunity to the intense competition in various sales districts. The record contains no evidence that any of respondent's competitors were unable to operate their roasting plants at any time because of respondent's activities. None of those cited by complaint counsel has departed any of the cited areas, let alone halted operations; even the least successful (Paul De Lima and Euclid) have remained viable. Still others, including Chock Full O'Nuts and Savarin as well as Folger's, expanded into additional Eastern areas. (*See* above, Section IV.A.4.)

Although for some of the roasters allegedly injured by respondent's actions the sale of regular ground coffee in specific areas did become unprofitable for a time, none ever decided to cease plant operations. For example, Paul De Lima, a local roaster in the Syracuse area, narrowed its regular ground coffee marketing radius from the Greater Syracuse area to the city itself in response to the increased competition. However, it then extended its marketing efforts to include institutional and office buyers and in 1979 reported an overall profit. (De Lima, Tr. 2535 and 2590.) Moreover, it later reexpanded to its original marketing radius of regular ground coffee. (Salesman, Tr. 5944.) Euclid, a roaster based in Cleveland, also distributed in western New York and Pennsylvania and all of Michigan, Ohio and West Virginia, so that respondent's activities in Cleveland were unlikely to have threatened its existence. Thus, the record strongly suggests that sales of ground roast coffee are unlikely to be disciplined by an outbreak of intense competition, price or non-price, within any Maxwell House sales district. (De Lima, Tr. 2535 and 2590.)

2. Prices and Profits

Complaint counsel maintain that high market shares in the alleged markets distinguished RMH from other brands and facilitated higher prices and profits for General Foods—a sign of market power. (CAB 16-18.) We have already noted our reservations regarding the evidence on prices. Whether the source is higher wholesale prices, lower promotional costs, or some combination of the two, the record does show that Maxwell House enjoyed greater profits in sales districts where it was more popular. (IDF 283-302.) Whether we can infer market power from this evidence depends upon RHM's power over ultimate consumers. Product differentiation does not permit the restriction of output and maintenance of prices above competitive levels unless the producer can restrain ultimate buyers from turning to other brands.[62] If General Foods enjoys monopoly prices and profits in coffee sales, it should be visible at the retail counter in the price of RMH.

The evidence in the record indicates otherwise. Retailers view coffee as a "board item," a product which is among the "most price sensitive items that we carry. . . ." (Engel, Tr. 1707.) Sales volumes and relative shares in the RMH sales districts fluctuated widely as consumers responded to price changes and promotional features of various brands. There are **[50]** numerous examples of this extreme share sensitivity to relative prices in every area in which predation is alleged and it is corroborated in testimony by witnesses for both parties.

Prior to Folger's October 1971 entry into the Youngstown sales district (Cleveland and Pittsburgh areas), the first focus of Folger's eastern expansion, RMH average retail prices had previously tended towards close parity with its major competitor, Hills Bros. (IDF 318-20; CX 89D; Toy, Tr. 2149-2150; Trone, Tr. 1462-3; Engel, Tr. 1648, 12067-8, 12070, 12095-6; Epstein, 12161-2.) But the average parity obscured frequent differences among brands depending on which one was being featured by local retailers. As described in Maxwell House's documents, Youngstown was a "hot" features area. First one brand and then another would reduce price or increase promotions in efforts to gain share. The moves proved successful—but only for temporary sales gains; in the 1960s and early 1970s RMH penetrations had varied from 33 to 52 percent, Hills from 14 to 37 percent, and Chase and Sanborn from 6 to 15 percent. (CX 85B, 86F; *see also,* Engel, Tr. 12070.)

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[62] In that regard, a differentiated brand may offer a higher level of consumer satisfaction and hence a higher level of output than a lower price brand. In that case the higher output and not market power explains the higher price. *See* Bork, *supra*, note 19 at 313.

Folger's was repeatedly sold at a retail price above that of RMH in Youngstown (CX 528B, F.) Then, in 1976, for the first time since Folger's entry, retailers began to sell the brand at lower prices than RMH. (CX 689A.) In March of that year Folger's temporarily gained 10 percentage points as RMH lost 16 points. (CX 683B.) Over the course of the year Folger's gained and RMH lost 3 points apiece.

Thus, in the most successful area for RMH, where it held a [51] 3-to-1 advantage over the number two brands, its fortunes fluctuated with its relative retail price. When comparable brands were priced at a discount compared to RMH, it lost sales. When RMH regained a pricing advantage, it gained sales. The same held true for Folger's, Hills Bros., and, earlier, Chase & Sanborn.

When Folger entered its second Maxwell House sales district, Philadelphia, in February 1973, RMH was being priced as much as 3 to 4 cents per pound *below* its closest major competitors, Hills and Chase & Sanborn. (CX 89A-C.) Folger's was priced for three months at a premium of 3 to 5 cents per pound above the other major brands. (CX 521A.) At that time, a Folger's document noted the extreme price sensitivity of coffee consumers, calling its pricing disparity with RMH and others the major problem with its introductory efforts. The Folger's memo said:

> We view our Philadelphia pricing disadvantage as a potentially crippling problem which may well preclude our attaining a reasonable franchise. Our overall experience in the coffee business is that consumers are keenly price sensitive. So much so, in fact, that parity pricing is a basic strategic objective in the Folger area. Adherence to that objective is regarded as critically important, despite our market leadership position.[63] [52]

In fiscal 1977, RMH prices in the Philadelphia district rose above Folger's and those of its other major competitors, whereupon RMH lost 15 per cent of its share of sales. (CX 691B-C; CX 1072.) With rapidly escalating coffee bean prices that same year, RMH also lost significant ground in the Boston and New York sales areas (not yet entered by Folger's) to Chock Full O'Nuts and the store brands, as

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[63] CX 521B. The memo noted two similar experiences outside the eastern area:

> In two instances in the recent past in which any major brand has been out of line in the Folger area, both underscore coffee pricing sensitivity. In our Portland district Maxwell House gained a [3.5 cents per pound] advantage over Folger in the 2-lb. size in early 1972 [and within 6 months had] . . . increased its 2-lb. share by 13 percent, while Folger's . . . declined by 10 percent. [In Kansas City a 4 cents per pound Maxwell House advantage on the 3-lb. size caused a similar shift to RMH.] It should be noted that both these districts are long-established Folger districts in which we are the dominant brand with shares of 36 percent and 54 percent respectively, vs. Maxwell House at 6 percent and 16 percent respectively. (CX 521B.)

RMH prices rose more rapidly than those of its competition. (CX 687A, 689B, 691B, 192B.)

Folger's on the other hand, got the benefit of a lower retail price in Syracuse, "the first expansion [district] where Folger achieved a shelf price advantage" (*i.e.*, a lower retail price than RMH). (CX 20-Z94; *see also* CX 528F). Within two months of Folger's entry, it had attained a 31 percent share against 36 percent for RMH. (CX 710E.) Two quarters after its entry, Folger's was at a 22 percent share and RMH had declined to 34 percent or 8 points below its base level. (CX 709D, E.) Two years later a Maxwell House memo recommended that RMH match a Folger's price cut in order to retain retail shelf price parity and thereby avoid "a loss of 10 share points." (CX 160A.) The RMH Fiscal 1977 marketing plan stated:

> Consumers have been educated to buy ground coffee on price. Ground coffee shares are dramatically responsive to changes in price levels vs. competition. (CX 20-Z38; *see also* CX 193B.)

In sum, there is no evidence that indicates either RMH, Folger's, or any other brand could sustain retail prices above the major branded competition without incurring "dramatic" share **[53]** losses in any area of the country and in the nation as a whole. (*See also,* IDF 302-329.)[64] To the contrary, retail price premiums appear to have had the same debilitating impact regardless of length of a brand's establishment or level of success in an area. No major brand could increase price without losing substantial retail sales.[65] Nowhere does the evidence support a finding that any brand held or was threatening to gain the kind of market power that gives rise to antitrust concerns.[66]

In sum, the extreme consumer sensitivity to coffee prices caused a strong tendency towards retail price parity among the leading brands in every area, with diversions from such parity occasioning sharp swings in relative sales. We cannot find evidence of a competitive breakdown at the consumer level. The evidence at the wholesale level suggesting a positive correlation **[54]** between prices, profits, and sales shares does not, therefore, demonstrate either Maxwell House's monopoly power or the probability of achieving it in ground roast coffee at the wholesale level. The source of that correlation must lie elsewhere.

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[64] This much has largely been conceded by complaint counsel. (*See* CPF 10-13.)

[65] Thus, while there may be a loyal consumer following for each major brand, the record suggests that these dedicated consumers are not the ones determining the prevailing retail price of coffee. A major portion of each brand's franchise apparently comprises consumers ready to take advantage of a relatively minor discount in another brand; and the loyalty of even the dedicated consumers seems less than absolute. *See* Bork, *supra*, note 19 at 312-13; Nutter, *The Plateau Demand Curve, and Utility Theory*, J. Pol. Econ. 525 (1955). As we noted earlier, the law does not demand "perfect" price competition. The ability of some roasters to compete on the basis of quality or reputation, and charge a higher price for their efforts, does not signify unhealthy market power. To the contrary, such competition meets a demand and will persist only so long as its results are valued by consumers.

[66] *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

C. *Efficiency and Profits*

Crucial to the competitive motivations of respondent and its rivals is the existence of larger gross profits generated by the leading regular ground coffee brand in an area. This phenomenon derives from the frequent use of regular ground coffee as a loss-leader by the grocery trade to generate store traffic. Except in periods of extreme price escalation or of price controls, coffee is valued very highly by grocers as a loss-leader, because it results in substantial store traffic. (CX 191B, 193B, 205A; Toy, Tr. 2027; Salesman, Tr. 5937-9; Epstein, Tr. 12187.) Indeed, nationally, as much as 50 percent of coffee is purchased on a reduced price basis as a result of store features, manufacturer's coupons, or some other promotion. (CX 191B.)

The record also contains many examples of the disproportionate use of the leading coffee brand as a loss leader. Prior to the July 1972 Brazilian frost, respondent's documents state, for example, that in the eastern area RMH was the only coffee brand priced at retail below retailer's cost. (CX 69M, 109H, 111C.) Before Folger's February 1973 entry into the Maxwell House Philadelphia sales district, RMH was being sold substantially below wholesale cost throughout the eastern complex [**55**]—including the Boston and New York City districts as well as Philadelphia.[67] (CX 89B.) This was also the case in part of the Syracuse district prior to Folger's entry in October 1974, where RMH had been the only brand that grocers were selling below cost. (CX 539C.)

In the western area, the roles were reversed, but the story was the same. RMH was considerably less successful there, and Folger's was the leading brand. Maxwell House found it necessary to offer larger incentives to retailers than Folger's did (*i.e.*, lower wholesale prices) in order to achieve retail pricing parity. (CX 3-Z33; CX 8Z.)

In short, the proximate source of superior profits for leading regular coffee brands in an area was their exceptional ability to generate store traffic when sold at a discount from normal retailer profit margins.[68] Our concern with this phenomenon is whether it ultimately results from output-enhancing or output-restricting behavior.

The record shows that in the regular ground coffee industry, differences in the degree of promotion and quality (or its consistency) among brands explain the greater willingness of merchants to feature the leading brands in an area and to pay more for that opportunity.

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[67] Even after Folger's entry in Philadelphia, RMH was sold at lower retailer margins than Folger's. (CX 106P, 521A,B, 532F.)

[68] Put another way, leading brands carry a lower cost of distribution than their less successful competitors. That lower cost is equal to the value retailers attach to the traffic-generating ability of the leading brand.

Consumers respond not only to changes **[56]** in relative prices, but also to changes in the intensity of advertising, the kind of product promotion and the level of perceived quality or taste.

Like price changes, the mix of marketing elements appears to have an extremely important influence on sales. For example, one of complaint counsel's retailer witnesses testified that at the time of Folger's expansion, RMH was a more valuable item to him than either Hills or Chase & Sanborn because of its "greater customer acceptance," which he attributed to Maxwell House's superior "quality and promotion against the ultimate consumer." (Engel, Tr. 1714-16.) Quality and taste depend upon a number of factors, including the kind of bean and the grinding and roasting processes used.

In part, at least, one leading brand suffered from what suppliers and retailers regarded as an inconsistent and confused marketing effort.[69] (IDF 271.) There is also substantial evidence of quality problems for a number of other roasters. As early as 1968, Maxwell House's documents indicated that the quality of one of its major competitors was "highly variable" and **[57]** "poor compared to Maxwell House, Folger's and Chase & Sanborn," attributing this result to a periodic mixing-in of cheaper, poorer quality coffee bean blends. (RX 973-4.) One of complaint counsel's retailer witnesses confirmed the existence of a serious consistency problem for that product in the early 1970's—a problem so severe as to preclude continued success in the Cleveland area. (IDF 271, 272; Engel, Tr. 1698-1700.) Similar quality problems troubled other major brands. (Engel, Tr. 1713; Graham, Tr. 10570.)

Although there is no evidence of any problems with the quality element of Folger's marketing methods, there is evidence of an inefficient initial choice among its advertising and promotion policies. Both Folger's and Maxwell House attributed Folger's superior results in the Syracuse district, its third district target, in part, to a major shift in its marketing strategy (from sampling and retailer coupons to direct mail consumer coupons and straight cash allowance incentives to retailers.) (CX 540A, D, 710A, F; *see also,* Metzger, Tr. 11,870-79.)

In short, the record indicates that the leadership position of the RMH brand in the eastern sales areas stemmed in large part from respondent's superior efficiency in advertising, promoting and maintaining the quality of that brand in those areas. Through these efforts, coffee consumers gained valuable information from Maxwell House promotions and attention to quality. Retailers capitalized on consumer acceptance of the brand by using it as an advertising tool to build store [58] traffic. For these features, retailers were willing to pay a premium to Maxwell House (or other leading brands). But it was not passed on to the coffee consumer. Nor was it safe from capture by other rivals. Hence, we cannot find respondent's attempt to maintain or enhance its sales position to be anticompetitive by effect or design.

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[69] Six months after Folger's 1971 Cleveland area entry, a 1972 Maxwell House document indicated:

> The only *major* competitor in the mild segment [now in the East] is Hills Brothers. There are several indications this brand is in trouble, and is highly *vulnerable* to a *competitive* introduction. . . . [I]t has evolved into primarily a price brand, with no solidly established consumer franchise. With an inferior product (loses significantly to RMH) and no consumer image (six campaigns in past several years) Hills will be severely hurt by the first major entry into the 'mild' segment. (CX 109 F, emphasis in original; *see also,* Laster, Tr. 7076-8.)

D. *Conclusion*

We agree with the ALJ that the evidence in this record indicates the relevant markets are, at the very least, larger than those alleged by complaint counsel. In the face of the substantial entry shown in the record, neither price differences, transportation costs, nor different levels of product acceptance by consumers among any of respondent's sales districts or portions thereof are sufficient to establish the requisite entry barriers for a finding that they are separate markets. We need not, however, reach the question of whether the record supports the United States as the relevant market.

We agree with the ALJ that complaint counsel have not shown respondent to possess any ability or prospect thereof to control price or exclude competition from any of the alleged markets. Respondent's sales, as well as those of its competitors, are simply too responsive to changes in price and product promotions to support an inference of monopoly power. We also conclude that at least a major source of the superior profitability of the more successful firms in the alleged markets has been their superior efficiency in marketing regular ground coffee and in giving retailers and consumers what they want. [59]

For all these reasons, we must find that Maxwell House did not come dangerously close to gaining monopoly power as a result of any of its challenged conduct in any of the alleged markets. Quite to the contrary, its actions were output-enhancing and procompetitive—the kind of conduct the antitrust laws seek to promote. Therefore, we dismiss complaint counsel's charge of attempted monopolization under Section 2 of the Sherman Act.

V. Unfair Methods of Competition Charge

Complaint counsel contend that, even if Maxwell House did not violate Section 2 of the Sherman Act, the company's responses to Folger's eastern expansion were unfair methods of competition, under Section 5 of the Federal Trade Commission Act. (CAB 46-49.) By this argument, pricing below cost and employing a "fighting brand" are anticompetitive tactics that can injure competition when employed by a firm with substantial market power. Section 5, according to complaint counsel, was intended to be prophylactic in its effect and to prevent antitrust violations in their incipiency; therefore, under Section 5, the degree of market power need not reach the Sherman Act threshold to establish a violation. In short, we are asked to expand the reach of the prohibition against attempted monopolization in the Sherman Act by condemning less offensive conduct under the purview of the Federal Trade Commission Act.

It is true that the broad language of Section 5 of the Federal Trade Commission Act permits the Commission to supplement **[60]** the more specific terms of the antitrust laws.[70] Exactly how far that authority extends, however, is an issue the Commission should treat cautiously. While Section 5 may empower the Commission to pursue those activities which offend the "basic policies" of the antitrust laws,[71] we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed. Senator Cummins, a principal sponsor of the Act, explained the words, "unfair competition," to his colleagues as follows:

> It will be the duty of the Commission to apply those words in the sense precisely as it is now the duty of the court to apply the words "undue restraint of trade" in the sense in which we commonly understand that phrase. 51 Cong. Rec. 13048 (1914).

The record in this case does not offer a rationale for using the Federal Trade Commission Act to graft an extension onto Section 2 of the Sherman Act. We have dealt at length with evidence of the charge that Maxwell House illegally attempted to monopolize the regular ground roast coffee market. Complaint counsel refer to the same evidence to support their claim of an unfairness violation of Section 5. We believe our earlier analysis applies with equal force now. **[61]**

The qualitative differences among the products and the consumers' loyalty to certain brands in the market for ground roast coffee do not indicate the kind of market power the antitrust laws were intended to address. The failure of Folger's to reach the local sales volumes of RMH is not an injury to the competitive process, but a result of healthy competition. Complaint counsel's assertion that Maxwell House managed to postpone Folger's introductions into eastern markets is not supported by the evidence. Finally, we do not think that the use of a product design or advertising theme which bears a resemblance to that of a competitor, without more, rises to a violation of Section 5. There is no evidence of consumer confusion or deception under any accepted legal standard that could form the basis for a finding of unfair competition.

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[70] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-21 (1966).

[71] *Id.* 384 U.S. at 321.

What the record does reveal is an episode of intense competition that allowed consumers to purchase the kinds of coffee they prefer at attractive prices. There is no evidence that this advantage came with the risk of future price premiums through a monopolist's recoupment of lost profits. Accordingly, we reject complaint counsel's argument that Maxwell House violated Section 5 of the Federal Trade Commission Act. As the Commission observed in *United Fruit Co. et al.*:

> Certainly, the logic of complaint counsel's argument would require companies concerned with competitive threats in the marketplace to sit back and wait until the threat becomes a reality before taking action. This is surely not the aim and purpose of our competitive marketplace nor the role of competition which the Commission was created to promote. (82 F.T.C. at 163.) **[62]**

The proscription against attempted monopolization in Section 2 of the Sherman Act does not require a showing of monopoly power or injury to competition—a dangerous probability is sufficient. We do not believe this standard should be changed when a case is brought under Section 5. To distinguish between an attempt to monopolize and an incipient attempt on the basis of potential market power is to engage in such fine distinctions as to challenge the legal philosopher, let alone the competitor trying to conform its conduct to the law. If the conduct at issue here cannot reach the early threshold of doubt under the Sherman Act, we will not condemn it under the Federal Trade Commission Act.[72]

VI. Price Discrimination Charge

Complaint counsel argue that Maxwell House violated Section 2(a) of the Robinson-Patman Act by countering Folger's eastern moves with discriminatory prices. (CAB 49-56.) Specifically, confining RMH coupons and performance allowances to selected areas is alleged to have resulted in price differences that are prohibited by the Act. The ALJ concluded that incentives and coupons for consumers to redeem are not elements of the wholesale price of coffee. Accordingly he dismissed the Robinson-Patman count for failure of proof. **[63]**

We need not examine the record for support of discriminatory prices, however defined, for we have already found a dispositive failure of the evidence on other grounds.

Section 2(a) of the Robinson-Patman Act prohibits price discrimination when its effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person. . . ." (15 U.S.C. 13(a).) The requirement that price discrimination pose potential harm to competition has been upheld consistently by the courts. As the Ninth Circuit recently stated, "[S]ection 2(a) does not prohibit mere price discrimination. . . . [Plaintiff must prove that the] price discrimination produced a requisite effect on competition."[73] The Supreme Court has defined this effect as "a reasonable possibility that a price difference may harm competition."[74]

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[72] Because we based our decision on the finding of probability of success, it is unnecessary to determine whether Section 5 would require the same proof of intent as does the Sherman Act.

The requirement of proving competitive effects has recently provided for a reconciliation between Section 2(a) of the Robinson-Patman Act and Section 2 of the Sherman Act in cases involving attempted monopolization. The same facts that reveal a dangerous probability of successful monopolization will indicate a lessening of competition or a tendency to create a monopoly. Since both statutes are directed towards the same goal—the [64] protection of competition—it follows that the inquiries under each should be the same. We agree with the Ninth Circuit that:

> In primary-line Robinson-Patman Act cases, such as this one, the distinction between vigorous, but honest, price competition and predatory assaults on the competitive process is just as important as it is to Sherman Act cases brought under its Section 2. Under these circumstances the analytical standards should be no different.[75]

We have just conducted an extensive analysis of the competitive effects of General Foods' activities. We were unable to find any prospect of injury to competition from the events described in this record. Indeed, our reading of the evidence indicates that competition in General Foods' market is healthy and virtually invulnerable to the assaults of any one firm. The principal effect of the heated rivalry between Folger and Maxwell House has been to reduce the prices consumers pay for coffee and promote product quality. Competition in this industry has thrived, as both firms, and the other producers, have battled for the customers' franchise.[76] While there may be a lower threshold of competitive harm under the "reasonable possibility" standard of the Robinson-Patman Act than under the "dangerous probability" [65] standard of the Sherman Act, it is clear that the evidence in this record satisfies neither one. Healthy competition does not violate the Robinson-Patman Act.[77]

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[73] *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1040 (9th Cir., 1981), *cert. denied*, U.S. 103 S.Ct. 58 (1982) [Citation omitted].

[74] *Falls City Industries, Inc. v. Vanco Beverage, Inc*, 103 S.Ct. 1282, 1288 (1983) (Citing *Corn Products Refining Co. v. FTC* 324 U.S. 726, 742 (1945)).

[75] *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1042 (9th Cir. 1981), *cert. denied*, U.S. 103 S.Ct. 58 (1982); *Accord, D.E. Rogers Associates, Inc. v. Gardner Denver Co.*, 718 F.2d 1431 (6th Cir. 1983).

[76] The fact that some firms have gained ground and some have lost in the battle does not determine injury to competition. "Certainly the mere fact that [plaintiff] suffered losses and eventually ceased operations is not sufficient to establish a section 2(a) Robinson-Patman violation." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., supra*, at 1042; *Accord, Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961) (other competitors losing market share does not demonstrate injury).

CONCURRING OPINION OF COMMISSIONER MICHAEL PERTSCHUK

I concur in the Commission's decision to dismiss the complaint in this matter. On this record I cannot conclude that respondent General Foods engaged in predatory pricing or other conduct in violation of the antitrust laws.

The essential element of predatory pricing that is missing in this case is the "dangerous probability of success." *E.I. DuPont de Nemours & Co.,* 96 F.T.C. 653, 725 (1980). While I conclude that General Foods possessed sufficient market power[1] in at least some geographic markets to engage in effective predatory pricing, I am unable to conclude, on the basis of the facts of this case, that General Foods did engage in illegal predatory pricing.

A necessary element of predatory pricing is the likely effect of a pricing policy "that somehow restricts competition by driving out existing rivals or by excluding potential rivals from the market." Joskow and Klevorick, "A Framework For Analyzing Predatory Pricing Policy", 89 Yale L.J. 213, 219 (1979). It would theoretically be possible for a large, well-funded competitor to price below some measure of its costs for the [2] period of time necessary to drive a smaller competitor out of the market or to deter one from entering the market. The larger company would then be free to raise prices and gain market share. This scenario is only possible, however, where the larger competitor has a reasonable expectation of driving a smaller competitor out of the market or discouraging new entrants in the market. In other situations, pricing below some measure of cost will only result in aggressive price competition. Predatory pricing, like aggressive price competition, benefits consumers in the *short run.* The difference between them is that in the *long run* consumers are the losers when predatory pricing occurs.

The situation the Commission faces in General Foods has more in common with aggressive competition than predatory pricing. Even though General Foods priced below some measure of costs and had market power to influence prices in geographic markets considerably smaller than the entire U.S.,[2] it still did not have the ability to succeed at monopolization when dealing with a competitor as formidable as Procter & Gamble. As the Administrative Law Judge concluded, "it is simply inconceivable, given Procter & Gamble's marketing expertise and its financial resources . . . [that General Foods] could succeed in [3] monopolizing the sale of regular coffee in the [relevant] sales districts." Initial Decision at 149-50. *See also* IDF 231-32. I believe this conclusion is required, not because the activities of General Foods could not constitute predatory pricing, but because the record does not demonstrate a dangerous probability that General Foods could succeed at driving a determined and well-funded competitor such as Procter & Gamble out of the market. Nor is there any credible evidence that General Foods' pricing activities created a dangerous probability of driving any smaller competitors out of the market or deterring their entry.

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[77] Because the requisite effect on competition has not been shown in this case, we need not decide the questions surrounding the proof of discriminatory prices. We should record, however, our reservations over the sufficiency of that evidence.

[1] General Foods' market share in its sales districts over the period 1971-77 ranged from a low of 34.9% to a high of 61.4%, averaging nearly 50%. IDF 278. I have no trouble in concluding that such market power could result in illegal predatory pricing in other circumstances.

[2] I disagree with the ALJ's conclusion that the relevant geographic market is the entire United States. The ALJ dismissed substantial evidence of General Foods' supra-competitive profits (IDF 330-333) in areas significantly smaller than the entire U.S. as well as substantial barriers to entry such as advertising costs and competition for scarce shelf space. Furthermore, there is substantial evidence that General Foods' pricing and marketing policies assume that distinct geographic markets much smaller than the entire U.S. exist. (IDF 283-302)

While much of the text of the majority's opinion is mere dicta, I am compelled to register my disagreement on several important points. First, the majority's opinion suggests that pricing below "cost" is an "ambiguous signal," (Maj. Op. at 21) and that "prices below some measures of variable cost do not by themselves mean the seller has violated the antitrust laws." (Maj. Op. at 22). But prices at that level are highly suspect if not *per se* predatory.[3] More importantly, however, prices above some measure of average variable cost can also be predatory.[4] [4] Courts are increasingly examining the effect of pricing in the market in which it occurs rather than merely adhering to strict cost/price accounting principles to determine whether pricing is predatory.[5] Some of the factors that might lead the Commission to conclude that illegal predatory pricing exists even when pricing is above average variable cost include the existence of significant barriers to entry, the use of limit pricing, the existence of excess capacity in the market, the use of non-price predation, and other competitive factors.[6] The Commission and the Courts should retain the flexibility to condemn predatory pricing as illegal where an examination of a firm's pricing and other actions in the competitive environment demonstrate the requisite predatory intent, market power, and dangerous [5] probability of successful monopolization even if prices are above the level of average variable cost. This accords with the judicial trend to employ a more flexible test than that proposed by Professor Areeda and Turner, a test which has the distinct disadvantage of holding "dominant firm pricing per se legal."[7]

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[3] *See e.g., Northeastern Tel. Co. v. AT&T,* 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1036 (9th Cir. 1981), *cert. denied,* 103 S.Ct. 58 (1982).

[4] *See* generally, Brodley and Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards," 66 Cornell L. Rev. 738 (1981); Joskow and Klevorick, "A Framework for Analyzing Predatory Pricing Policy," 89 Yale L. J. 213 (1979).

[5] *See International Air Industries Inc. v. American Excelsior Co.,* 517 F.2d 714, (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976) *Superturf Inc. v. Monsanto Co.,* 660 F.2d 1275 (8th Cir. 1981); *Transamerica Computer Co. v. IBM Corp.,* 698 F.2d 1377, (9th Cir. 1983); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.,* 615 F.2d 427, (7th Cir. 1980); *Pacific Engineering Prod. Co. v. Kerr-McGee Corp.,* 551 F.2d 790 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977), *California Computer Products v. IBM,* 613 F.2d 737 (9th Cir. 1979); *ILC Peripherals Leasing Corp. v. IBM,* 1458 F.Supp. 423, (N.D. Cal. 1978) aff'd. 636 F.2d 1188 (9th Cir. 1981).

[6] *See Transamerica Computer Co., Inc. v. IBM Corp.,* 698 F.2d 1377, 1387 (9th Cir.) *cert denied* 104 S.Ct. 370 (1983) ("prices exceeding average total cost might nevertheless be predatory in some circumstances" including limit pricing and temporary reductions by a monopolist to a level "above average total cost but below the profit-maximizing price whenever a new entrant appears ready to enter the market."); *ILC Peripherals Leasing Corp. v. IBM, supra* (barriers to entry should be considered in addition to price/cost analysis); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., supra,* 668 F.2d at 1035 (standard for determining illegality of predatory pricing not based on "rigid adherence to a particular cost-based rule").

Second, I disagree with the implication in the majority opinion that the standard of liability for attempted monopolization under the Sherman Act is the same as the standard for price discrimination under Section 2(a) of the Robinson-Patman Act. (Maj. Op. at 62-65). Under Section 2(a) of the Robinson-Patman Act the Commission need only prove that the effect of price discrimination "may be substantially to lessen competition." This should not be confused with the need to demonstrate a dangerous probability of successful monopolization to prove predatory pricing under the Sherman Act.[8] Similarly, while the majority pays lip service to the notion that Section 5 of the FTC Act has a broader reach than the Sherman Act (Maj. Op. at 59-62), I think it is important to state unequivocally that Section 5 gives the Commission important powers to prohibit conduct that does not fall squarely within either the Sherman Act or the Robinson-Patman Act.[9] For example, the use of strategic, [6] below cost pricing which harmed competition by significantly delaying or permanently deterring entry of potential competitors could constitute an unfair method of competition even if General Foods was unlikely to achieve a monopoly position.

CONCURRING OPINION OF COMMISSIONER PATRICIA P. BAILEY

I concur in the dismissal of this case, but perhaps on narrower grounds than the majority and certainly without endorsing much of the overbroad and unnecessary theory which is introduced into the opinion.

My reason for dismissing the case is simply a demonstrated lack of anticompetitive effects. In all the proposed submarkets General Foods lost market share by the end of the alleged periods of predation. Moreover, no competing roasters were forced to halt operations or were driven from the market; some even expanded business.

As to the appropriate geographic market definition, I agree that the price data are not clear enough to support complaint counsel's chosen submarkets of General Foods' sales districts. Moreover, evidence on significant levels of transshipments tends to disprove those specific markets. On the other hand, I would emphasize that the transshipment evidence, standing alone, could not establish anything close to a national coffee market. For one thing, evidence on product differentiation as an entry barrier and market-definer is a good deal stronger than the opinion acknowledges. All the major coffee wholesalers' promotional strategies are tailored to meet the differing demand characteristics of some local area. (IDFs 38–67) The trouble is, the borders of a market can be defined by grocery retail and distributional patterns, by television broadcast limits, or by [2] coupon redemption limitations. (*e.g.*, IDFs 69–72, 82–84, 88–89) No one of these variables stands out as the consistent and direct equivalent of General Foods sales districts; nor is it possible, on this record, to use these factors to draw more accurate local markets. This does not mean, however, that product differentiation can never be an entry barrier,[1] merely that in this instance there has been an inexact showing of its scope and effect. I must therefore disassociate myself from that part of the opinion which so strongly suggests that the term "entry barriers" can never be applied to any cost faced by both current market participants and potential entrants. This "Stiglerian" definition is flawed by failure to recognize that firms already in the market often spend far less to get the same result as the entrant, whether that result be scale economies, know-how, promotional and distributional efficiencies, or consumer acceptance. Established firms build on previous investments in market knowledge whereas their new rivals face significant information costs. *See, e.g.*, Demsetz, *Barriers to Entry*, 72 Amer. Econ. Rev. 47, 50 (1982); Schmalensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case*, 127 U. of Pa. L. Rev. 994, 1021 (1979). Thus in this case, over the last twenty years, before Procter & Gamble there were only two major entrants into General Foods' eastern sales districts, and [3] much evidence linking their success to substantial promotional efforts. Procter & Gamble's own experience shows how successful entry turns on stimulating local consumer demand, and that such efforts are both difficult and expensive. The nation's second largest coffee producer found it neither quick nor easy to erode General Foods' dominance of the east coast and any submarkets therein.

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[7] Brodley and Hay, *supra*, 66 Cornell L. Rev. at 793.

[8] *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co., supra*, 668 F.2d at 1042.

[9] *See e.g., FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Grand Union v. FTC*, 300 F.2d 92 (2d Cir. 1960). *See also* Handler and Stever, "Attempts to Monopolize and No-Fault Monopolization," 129 v. Pa. L. Rev. 125, 177-180 (1980).

I applaud the time-saving analytical approach taken in the opinion, with its emphasis on doing no more than is necessary to resolve the case. I regret, therefore, that having mapped out such an efficient course, the opinion then immediately strays into a wholly unnecessary discussion of the correct cost standard for predation. I will reserve my full comments on this subject until they are relevant to a Commission decision.[2] I will note briefly, however, that a majority of the Commission apparently feels that pricing above average variable cost is protected by a strong presumption of legality whereas pricing below average variable cost produces a fairly weak presumption of illegality. I believe the relative weights of the presumptions should be reversed.

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[1] *See, e.g.*, Caves and Porter, "From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competition," 91 *Q.J. Econ.* 241 (1977); Spence, "Entry, Capacity, Investment, and Oligopolistic Pricing," 8 *Bell J. Econ.* 534 (1977).

I believe the opinion does not sufficiently emphasize that there is a lower threshold for competitive harm under the Robinson-Patman Act than under the Sherman Act. Although the Sherman Act and Robinson-Patman Act march together on proof of [4] anticompetitive conduct and intent from below cost pricing, they part company when it comes to proof of injury to competition. The offense of attempted monopolization requires proof of a dangerous probability of success, while Section 2(a) of the Robinson-Patman Act requires only a showing that a price discrimination "may" substantially lessen competition. By phrasing the prohibition prophylactically, Congress intended to prevent the results of full scale anticompetitive behavior by catching price discrimination in its incipiency and preventing its growth. *FTC v. Morton Salt Co.,* 334 U.S. 37, 43–47 (1948). Moreover, while Section 2 of the Sherman Act requires attempted monopolization of a "part" of commerce, and therefore looks to general competitive conditions in the line of commerce affected, Section 2(a) of the Robinson-Patman Act requires only an impermissible effect upon competition among the price-discriminating seller's competitors or customers. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1042 (9th Cir. 1981, as amended on denial of rehearing and rehearing *en banc,* 1982), *cert. denied,* 103 S.Ct. 58 (1982). Taken together, I interpret these two provisions of the Robinson-Patman statute to allow somewhat more latitude for a determination of competitive injury that does the Sherman Act.[3] This does not mean that the injury standard is inevitably satisfied by mere diversion of business from a competitor, or [5] even by one competitor's exit from the market due to alleged predatory pricing. On the other hand, the standard can be met by a showing of below-cost pricing which has severely weakened a class of competitors and augmented the predator's market power, albeit not to the very high levels which may be needed to prove a dangerous probability of success. In this case, however, I agree that injury to competition—in any quantum—has not been shown.

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[2] I have discussed predation previously, in my February 28, 1983, dissenting statement of the final order in *Borden, Inc.,* Docket No. 8978. [48 FR 9023 at 9030 (March 3, 1983)]

[3] *See generally,* Marasco, Tracing an Antitrust Injury in Secondary Line Price Discrimination Cases, 50 Fordham L. Rev. 909, 911–18 (1982).

FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain the initial decision.

It is ordered, That the complaint is dismissed.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3132. Complaint, April 11, 1984—Decision, April 11, 1984

This consent order limits the Joint Venture between General Motors Corporation and Toyota Motor Corporation to the manufacture and sale of no more than 250,000 subcompact cars per year, for a period of twelve years, ending no later than Dec. 31, 1997. While GM, Toyota and the Joint Venture are permitted to exchange information necessary to produce the Sprinter-derived vehicles, the order prohibits the transfer or communication of any information concerning current or future prices of new automobiles or component parts produced by either automaker; sales or production forecasts or plans for any product not produced by the Joint Venture; marketing plans for any product, including products produced by the Joint Venture; and development and engineering activities relating to the product of the Joint Venture.

Appearances

For the Commission: *Edward F. Glynn, Jr.*

For the respondents: *Richard W. Pogue, Jones, Day, Reavis & Pogue,* Cleveland, Ohio and *Robert C. Weinbaum,* in-house counsel, Detroit, Mich. for respondent General Motors Corp. *Earl W. Kintner* and *Eugene Meigher, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C. and *Takeo Tsukada,* in-house counsel, Toyota City, Aichi Prefecture, Japan for respondent Toyota Motor Corp.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Motors Corporation ("GM" or "General Motors") and Toyota Motor Corporation ("Toyota") intend to acquire shares in a Joint Venture corporation in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITION

1. For the purpose of this Complaint, the following definition shall apply: *new automobiles* means new passenger automobiles manufactured or sold in the United States or Canada, and includes light trucks and vans.

II. GENERAL MOTORS CORPORATION

2. General Motors is a Delaware corporation with headquarters at 3044 West Grand Boulevard, Detroit, Michigan.

III. TOYOTA MOTOR CORPORATION

3. Toyota is a Japanese corporation with headquarters at 1, Toyota Cho, Toyota City, Aichi Prefecture 471, Japan.

IV. JURISDICTION

4. At all times relevant herein, each of the companies named in this complaint has been engaged in or affected commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12), and Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

V. THE PROPOSED JOINT VENTURE

5. Pursuant to an agreement reflected in a Memorandum of Understanding (hereinafter "Memorandum") executed by GM and Toyota on February 17, 1983, attached to this Complaint as Exhibit 1, GM and Toyota have agreed to form a Joint Venture corporation (hereinafter "Joint Venture"). GM and Toyota will each acquire one-half of the shares in the Joint Venture and will each designate one-half of the Board of Directors of the Joint Venture. The Joint Venture will be managed principally by persons designated by Toyota. The Joint Venture will manufacture new automobiles that will be designed by Toyota in consultation with GM and will be sold to GM, and may also manufacture new automobiles that would be sold to Toyota.

VI. TRADE AND COMMERCE

6. The relevant product market is the manufacture or sale of small new automobiles, which includes automobiles commonly referred to as subcompact, compact, and intermediate sized automobiles.

7. The relevant geographic market is the United States and Canada.

8. Concentration in the relevant product and geographic markets is high.

9. Both GM and Toyota are substantial competitors in the relevant product and geographic markets.

VII. EFFECTS OF THE PROPOSED JOINT VENTURE

10. The effect of the Joint Venture may be substantially to lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), or may be unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways:

(a) The output of the Joint Venture is likely to be significantly expanded beyond the single module, capable of producing not more than 250,000 new automobiles per year, an expansion that would not be reasonably necessary to accomplish any of the legitimate purposes of the Joint Venture; and

(b) The Joint Venture would provide no adequate safeguards against the use of the Joint Venture, or the relationships between GM and Toyota that are occasioned by the Joint Venture, for the transmission of competitively significant information beyond the minimum degree reasonably necessary to accomplish the legitimate purposes of the Joint Venture.

11. Each of the effects identified in Paragraph 10, singly or in combination, would significantly increase the likelihood of noncompetitive cooperation between GM and Toyota, the effect of which may be substantially to lessen competition in the relevant markets, and would not be reasonably necessary to obtain any legitimate, procompetitive benefits of the Joint Venture.

VIII. VIOLATIONS CHARGED

The parties' agreement to the proposed Joint Venture constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

EXHIBIT 1

TOYOTA MOTOR CORPORATION-
GENERAL MOTORS CORPORATION

MEMORANDUM OF UNDERSTANDING

FEBRUARY 17, 1983

TOYOTA MOTOR CORPORATION (Toyota) and GENERAL MOTORS CORPORATION (GM) agree to establish a joint venture (JV) for the limited purpose of manufacturing in the United States a specific automotive vehicle not heretofore produced, and related components described below. In so doing, it is the intent of both parties to provide such assistance to the JV as is considered appropriate to the enhancement of the JV's success. The JV will be limited in scope to this vehicle and this agreement is not intended to establish a cooperative relationship between the parties in any other business.

The purpose of this Memorandum is to summarize the current understanding of Toyota and GM regarding the basic parameters of this limited manufacturing arrangement.

Product

The vehicle to be manufactured by the JV will be derived from Toyota's new front-wheel Sprinter. Body styles will include a 4-Door Sedan and (6–12 months later) a 5-Door Liftback. Toyota will retain design authority over the vehicle, in consultation as to vehicle appearance with GM, the purchaser. As modifications will probably be made to the Sprinter or Corolla over time in accordance with market demand, Toyota will effect similar changes to the JV vehicle if such changes are deemed desirable by the parties. Vehicle certification will be handled by Toyota, with assistance provided by the JV and GM as agreed upon by the parties.

Manufacturing

The JV will begin produciton of the GM-specific vehicle as early as possible in the 1985 Model Year with nominal capacity of approximately 200,000 units per annum at GM's former assembly facility in Fremont, California.

As part of the technical assistance stated hereinafter, Toyota will take the initiative, in consultation with GM, in designing the Fremont manufacturing layout and coordinating the related acquisition and installation of its machinery, equipment and tooling. In this regard, if GM deems it necessary for orders to be placed for construction of buildings, JV machinery, equipment and tooling prior to the establishment of the JV to facilitate a timely introduction of the initial JV vehicle in the 1985 Model Year, GM may do so in its own name directly or through Toyota, and the parties agree to share equally any capital expenditures or cancellation charges arising from such orders. The only exceptions to the above are as follows: In the event the JV is not established as a result of unfavorable U.S. governmental review of the matters set forth in this Memorandum or, following consultations between the senior management of Toyota and GM, as a result of either party notifying the other on or prior to one hundred twenty (120) days following the signing of this Memorandum of Understanding by the parties that such party is not satisfied with the prospects for developing an acceptable employe relations structure, GM shall bear 100% of the cost of such expenditures and charges.

GM's annual requirements are presently expected to exceed 200,000 units per annum. Both parties will, therefore, assist the JV in increasing its production to the maximum extent possible within the available capacity. Requirements for capacity beyond the first module will be the subject of a separate study.

The JV may later produce a variation of the JV vehicle for Toyota. Toyota and GM may also agree for GM to source the GM-specific vehicle from Toyota assembly plants in Japan, freeing JV capacity for Toyota's full or partial production of Toyota-specific vehicles.

Purchase of Production Materials

The JV will purchase its production materials from those sources providing the least possible cost, consistent with its standards for product quality and vendor reliability of supply. Based on this principle, Toyota and GM have agreed upon a tentative sourcing approach, under which specific components to be purchased from Toyota, GM and other outside vendors have been separately identified. Components to be manufactured by the JV, mainly major stampings, have also been identified.

Marketing

All GM-specific vehicles produced by the JV will be sold directly to GM or its designated marketing units for resale through GM's dealer network. If any variation of the JV vehicles should be produced by the JV for Toyota, such vehicles would be sold directly to Toyota or its designated marketing unit for resale through Toyota's dealer network. Neither Toyota nor GM will consult the other with respect to the marketing of JV products, or any other products, through their respective marketing organizations.

Vehicles sold by the JV should be priced by the JV to provide a reasonable profit for the JV, Toyota, and GM. To accomplish this, production costs must be kept as low as possible through the combined best efforts of the JV, Toyota, GM and other major suppliers. In this regard, the parties have been conducting extensive studies detailing how each can work to minimize JV expenses.

The initial JV selling price of the JV vehicle to be sold to GM during the 1985 Model Year will be determined at least 60 days prior to the start of production by negotiation between the JV and GM. This negotiation will be based on the production cost estimated 90 days prior to the expected start of production by the JV, with estimates of said cost to be guided by the feasibility study. In no event, however, will the said initial JV selling price be higher than the upper limit nor lower than the lower limit, each as defined below. The upper limit shall be determined by adjusting for feature differences the Dealer Net Price less 8% of Toyota's then current U.S. model front-wheel drive Corolla equipped comparably with the JV vehicle concerned, and the lower limit shall be determined by adjusting for feature differences the Dealer Net Price less 11% of said Corolla. The adjustment for feature differences will be made by agreement between the JV and GM.

Thereafter, although there may be exceptions, the JV vehicle selling price will be revised and determined for each model year. The new selling price for the new model year will be determined by applying to the selling price for the previous model year the Index as defined in Exhibit A. Since the calculations embodied in the Index may occasionally yield a selling price which is at significant variance with then current market conditions, the JV and GM will in such cases negotiate a more appropriate selling price.

If model changes or specification changes of the vehicle manufactured by the JV are necessary, Toyota, GM and the JV will agree upon these model changes or specification changes. Toyota will present to the JV the plan for the model changes or specification changes concerned. Then, the JV will submit to and negotiate with GM the planned model changes and specification changes together with the planned price changes. These model changes and specification changes will be made as agreed upon by the JV and GM.

The methodology to be employed in pricing optional equipment available on the JV vehicle (both initial and subsequent) will be comparable to that described in the three preceding paragraphs.

The initial prices of Toyota and GM components purchased by the JV will be determined 90 days or more prior to the start of production by negotiation between the JV and component suppliers after the determination of the specifications of the JV vehicle. Identification of the respective sources of supply and determination of the initial component prices will be guided by the feasibility study, with adjustments made for changes in specifications and appropriate economics.

Thereafter, the prices of components will be reviewed semi-annually. The new prices will be determined by negotiation between the JV and component suppliers.

If it is anticipated that continuation of the above-mentioned methods for determination of the prices of the JV vehicles to be sold by the JV and of components to be purchased by the JV would cause those prices to be at such levels as the JV would incur the losses which could endanger the normal operation of the JV, Toyota, GM and the JV shall negotiate and take necessary measures.

As a fundamental principle, Toyota and GM shall each be free to price and free to market the respective vehicles purchased from the JV without restrictions or influence from the other.

Operating Responsibility

The JV will be jointly controlled by an equal number of Toyota and GM directors, in line with Toyota and GM ownership. Toyota will designate the JV president as the chief executive officer and chief operating officer. Toyota and GM will assign to the JV other operating officers as the JV president and JV directors may request, but the parties recognize that the question of which party shall designate the JV officers in charge of financial affairs, labor relations and certain other operations has not yet been agreed upon.

Quality Assurance

New vehicle warranty expense and administration will be the responsibility of the purchaser of the JV vehicle. The JV shall maintain product liability insurance for the benefit of the JV, the parties and other persons in such amounts as the parties may deem prudent, and the premium costs for such product liability insurance will be borne by the JV. In each product liability lawsuit involving a JV vehicle, the JV and each of the parties will communicate and cooperate with each other in all respects in investigating the facts surrounding the case and in litigating the matter. Each of the parties will refrain from taking adversarial positions against each other. To the extent possible under the JV's product liability insurance arrangements, the JV shall be the entity having the right to control such product liability lawsuits. However, the relative financial share of settlement or adverse judgment costs relating to such product liability claims or losses which are not covered by such product liability insurance shall be apportioned 60% to Toyota and 40% to GM. Matters relating to JV vehicle recall campaigns (including fines and costs of corrective actions) shall be the subject of further study and negotiation between the parties.

Technical Assistance

Toyota will grant to the JV the license to manufacture the vehicle developed by Toyota, and in exchange for this license, the JV will pay a reasonable royalty to Toyota as may be agreed upon by the parties. Toyota and GM will license the necessary industrial property rights to the JV, and in exchange for these rights, the JV will pay reasonable license fees to Toyota and/or GM as may be agreed upon by the parties. Toyota and GM will also provide technical assistance to the JV on a cost basis plus reasonable markup.

As part of the technical assistance, GM agrees to assist Toyota and the JV in completing compliance tests for safety, emissions and other areas, as agreed upon by the parties.

Purchase/Sale of Equity Interest

Toyota and GM (including, subject to the approval of the other party, their wholly or majority-owned subsidiaries) will each hold a 50% equity interest in the JV. Neither party may transfer its equity interest in the JV to a third party without the written consent of the other. The above notwithstanding, the JV will terminate not later than 12 years after start of production. The methodology for disposition of Toyota and GM equity interests prior to or upon JV termination will be incorporated in the JV documentation. Any surplus or deficit of the JV as at termination of the JV will be shared equally by Toyota and GM, in line with Toyota and GM ownership. Other issues relating to JV termination will be separately discussed.

Financing

Both Toyota and GM will contribute cash and/or fixed assets to the JV in exchange for equity interests. The amount to be contributed as equity will depend upon the JV's total projected capital requirements. In the event that either lenders or lessors insist that payments made by the JV be subject to appropriate guarantees, Toyota and GM agree either to provide such guarantees based on their pro rata share of the JV or to temporarily advance funds to the JV on their own account (also on a pro rata basis). To the extent permitted by creditors, Toyota and GM further agree that any security interests held by the parties in the JV assets will be shared equally.

Future Difficulties

If it is anticipated that the establishment or continuation of the JV would become difficult or infeasible due to any legal, political or labor-related reason which may arise in the United States, the parties will in good faith discuss the measures to be taken concerning the JV and endeavor to find appropriate solutions.

Agreements to be Concluded

Depending upon the specific organizational form, various agreements will be concluded among Toyota and GM (including subsidiaries thereof) and the JV. These will include the following: Partnership Agreement or Shareholders Agreement and Articles of Incorporation; Vehicle Supply Agreement (JV to GM); Toyota Component Supply Agreement (Toyota to JV); GM Component Supply Agreement (GM to JV); Toyota Service Parts Agreement (Toyota to JV and/or GM); Technical Assistance and License Agreement; Realty and Other Asset Sale and/or Lease Agreements; Product Responsibility Agreement; and other documents related to the foregoing.

Since it is extremely important that the JV begin production as early as possible in the 1985 Model Year, Toyota and GM commit their best efforts to completing such documentation by May 15, 1983. In any event, both parties agree to immediately begin the detailed production process planning necessary for conversion of the Fremont plant. Except as set forth in the separate provisions for JV buildings, machinery, equipment and tooling referred to in the "Manufacturing" section above, expenses incurred by either party which directly benefit the JV will be properly recorded and, if mutually agreed, will be subsequently rebilled to the JV.

Transaction Review

The agreements reached between the parties relate only to the manufacturing JV described above and do not establish any special relationship between Toyota and GM who continue to be competitors in the United States and throughout the world. Toyota and GM further acknowledge that there are no implied obligations or restrictions other than those expressly set forth.

This Memorandum of Understanding is subject to review by the governments of Japan and the United States. Both parties commit to use their best efforts to obtain favorable reviews. Until execution of all formal documentation, satisfaction by the parties with the results of any government reviews which are undertaken, and satisfaction by the parties with the prospects for developing an acceptable employe relations structure, each party reserves the right to terminate negotiations without liability to the other and the JV shall not be established. However, except as separately set forth in the "Manufacturing" section, the parties shall share equally the expenses and costs incurred by the parties which would, but for such termination, be rebilled to the JV.

Governing Language

This Memorandum of Understanding shall be executed in both an English and a Japanese version, but the parties agree that in the event of a conflict between the meaning of the English text and the Japanese text, the English text shall control.

Dated: February 17, 1983

TOYOTA MOTOR CORPORATION

/s/Eiji Toyoda, Chairman of the Board

GENERAL MOTORS CORPORATION

/s/Roger B. Smith, Chairman of the Board

EXHIBIT A

MARKET BASKET INDEX

The ten best selling models among the sub-compacts will be the models which constitute the basket. The models shall be revised at every model year on the basis of model volume in the U.S., using the latest R. L. Polk registration data for the previous 12 months.

For reference, the ten best selling models at present are as follows:

Chevrolet Cavalier
Chevrolet Chevette
Ford Escort
Honda Accord
Honda Civic
Mercury Lynx
Nissan Sentra
Subaru DL
Toyota Corolla
Volkswagen Rabbit

The "Index" shall be the weighted average rate of wholesale price fluctuations of these models from the prior model year to the current, weighting Corolla at 30% versus 70% for all other comparable models combined without regard of model volumes in the U.S.

For this purpose, the wholesale price shall be adjusted by eliminating the value of equipment changes and product improvements in comparison with the previous year models. To this end, the JV will evaluate and determine the value of equipment changes and product improvements, taking into account the opinions of Toyota and GM.

When competitive models are replaced by new models, or additional competitive models are brought in, neither the old model nor the new or additional model will be included in the calculation of the Index for the model year when such model changes take place. It will, however, be included in the calculation of the Index for subsequent model years.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition of shares in a Joint Venture corporation by the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of the complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent General Motors Corporation is a Delaware corporation with headquarters at 3044 West Grand Boulevard, Detroit, Michigan.

2. Respondent Toyota Motor Corporation is a Japanese corporation with headquarters at 1, Toyota Cho, Toyota City, Aichi Prefecture 471, Japan.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for the purposes of this Order the following definitions shall apply:

1. *GM* means General Motors Corporation, a corporation organized, existing and doing business under the laws of Delaware, with its principal offices at 3044 West Grand Boulevard, Detroit, Michigan, as well as its officers, employees, agents, its parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of GM's parents, divisions, subsidiaries, successors and assigns.

2. *Toyota* means Toyota Motor Corporation, a corporation organized, existing and doing business under the laws of Japan, with its principal offices at 1, Toyota Cho, Toyota City, Aichi Prefecture 471, Japan, as well as its officers, employees, agents, its parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Toyota's parents, divisions, subsidiaries, successors and assigns.

3. The term *New Automobiles* means new passenger automobiles manufactured or sold in or shipped to the United States or Canada, and includes light trucks and vans.

4. The term *Module* means an integrated manufacturing facility, comprising, at a minimum, body, paint and final assembly functions, capable of producing not more than approximately 250,000 New Automobiles per year.

5. The term *Joint Venture* means any corporation, partnership or other entity jointly owned, controlled, managed or directed by GM and Toyota, or by both GM and Toyota and any other entity or entities, that engages in the manufacture or sale of New Automobiles. The term *Joint Venture* includes the successors and assigns of a Joint Venture, and any entity formed subsequent to a Joint Venture, for purposes similar to the purposes of a Joint Venture.

6. Information is presumptively *public* if it is reported in a publication other than one authored by GM or Toyota.

II.

It is further ordered, That respondents shall not, without the prior approval of the Commission, form any Joint Venture except a single Joint Venture that is limited to the manufacture for or sale to GM of New Automobiles derived from the Toyota Sprinter and produced by a single Module. Nothing in this paragraph is intended to or is to be construed to prohibit this single Joint Venture from manufacturing or selling additional products to Toyota.

III.

It is further ordered, That respondents shall not form any Joint Venture that is not limited in duration to a maximum of twelve years after the start of production or that continues in operation beyond the earlier of twelve years after the start of production or December 31, 1997; *provided, however,* that nothing in this paragraph prohibits respondents from continuing any entity beyond twelve years for the limited purposes of winding up the affairs of the Joint Venture (which shall not include manufacturing New Automobiles), disposing of its assets, and providing for continuing warranty or product or service responsibilities for Joint Venture products.

IV.

It is further ordered, That respondents shall not exchange or discuss between themselves, or with any Joint Venture, non-public information in connection with New Automobiles relating to current or future:

1. Prices of GM or Toyota New Automobiles or component parts of New Automobiles, except pursuant to a supplier-customer relationship entered into in the ordinary course of business;
2. Costs of GM or Toyota products, except as provided in Paragraph V of this order;
3. Sales or production forecasts or plans for any product other than the product of the Joint Venture; or
4. Marketing plans for any product.

V.

It is further ordered, That respondents shall not, except as may be necessary to accomplish, and solely in connection with, the legitimate purposes or functioning of any Joint Venture, exchange or discuss between themselves, or with any Joint Venture, non-public information in connection with New Automobiles relating to current or future:

1. Model changes, design changes, product designs, or development or engineering activities relating to the product of the Joint Venture;
2. Sales or production forecasts or plans as they relate to the product of the Joint Venture; or
3. Costs of GM or Toyota products supplied to the Joint Venture.

VI.

It is further ordered, That each respondent shall, and respondents shall cause any Joint Venture to:

1. Maintain complete files and records of all correspondence and other communications, whether in the United States or elsewhere, between and among GM, Toyota and the Joint Venture concerning information described in Paragraph V;

2. Maintain logs of all meetings and nonwritten communications, whether in the United States or elsewhere, between and among GM, Toyota, and the Joint Venture concerning information described in Paragraph V, including in such logs the names and corporate positions of all participants, the dates and locations of the meetings or other communications and a summary or description of such information;

3. For a period of six years, retain and make available to the Federal Trade Commission on request the complete files, records and logs required by subparagraphs 1 and 2; and

4. Annually, on the anniversary date of this Order, furnish a copy of this Order to each management employee of the Joint Venture and each management employee of GM and Toyota with responsibilities for the Joint Venture, and furnish to the Federal Trade Commission a signed statement provided by each such employee affirming that he or she has read a copy of this Order, understands it, and intends to comply fully with its provisions.

VII.

It is further ordered, That each respondent shall, within sixty days from the date of issuance of this Order, and annually thereafter, submit in writing to the Commission a report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with the terms of this Order, and such additional information relating thereto as may from time to time reasonably be required.

VIII.

It is further ordered, That each respondent shall notify the Commission at least thirty days prior to any change in itself or in any Joint Venture that affects compliance with the obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporations or Joint Venture.

IX.

It is further ordered, That the prohibitions of this Order shall terminate five years after the termination of manufacturing or sales of New Automobiles by all Joint Ventures.

Commissioners Pertschuk and Bailey voted in the negative.

STATEMENT OF CHAIRMAN JAMES C. MILLER III

On December 22, 1983, the Federal Trade Commission provisionally accepted for public comment a consent agreement concerning the proposed joint venture between General Motors Corporation and Toyota Motor Corporation ("the venture"). Under that consent agreement, which was accepted after one of the most thorough and intensive antitrust reviews in Commission history, GM and Toyota may only undertake the joint venture subject to safeguards limiting the venture's scope and preventing the exchange of competitively sensitive information not required to achieve the legitimate objectives of the venture.

Over one hundred comments were received concerning the proposed consent agreement. None of these comments raised any significant new facts or substantive arguments beyond those already considered by the Commission. Because I believe the consent agreement, as modified today by the Commission, permits the venture's procompetitive benefits while minimizing anticompetitive concerns, I have voted to give final acceptance to it.

In analyzing the joint venture, it is important to separate reality from rhetoric. The Fremont venture is a limited production joint venture, not a merger of GM and Toyota. The extent of continuing competition between the companies dwarfs the limited area of cooperation represented by the venture. The FTC's approval of the joint venture, subject to the safeguards of the consent order, does not, as some have charged, ignore the antitrust laws, nor does it turn them upside down. Rather, it represents a careful application of antitrust principles to the specific facts at hand. The goal of the Commission's antitrust review has been to protect competition, and hence consumers. We've also been very sensitive to the substantial gains to competition and consumers projected by the venture under the safeguards incorporated in the consent agreement.

In evaluating the proposed consent agreement, the Commission weighed a number of possible competitive concerns. These included the effect of the joint venture pricing formula, the possibility of tacit or explicit collusion resulting from the venture, and the venture's effect on Toyota's incentives to enter into production in the United States. Nothing in the comments received alters my preliminary assessment that with the safeguards incorporated in the consent these possibilities do not represent significant antitrust dangers. Let me explain.

Without the restraints incorporated in the consent agreement, the Fremont venture does raise two potentially troubling issues: the venture's effect on GM's incentives to continue alternative production of small cars, and the possibility of anticompetitive information exchanges that are unnecessary to achieve the legitimate purposes of the joint venture. To address these concerns, the Commission has incorporated certain safeguards in the consent agreement. The joint venture's production at the Fremont plant has been restricted to ensure that GM would retain incentives to fill the remainder of its small car needs from other sources. Expansion of the venture would be permitted only if approved in advance by the Commission.

To ensure that the joint venture were not used to facilitate the exchange of competitively sensitive information unnecessary to its operation, the exchange of certain information was prohibited, and record-keeping and reporting requirements concerning exchanges of other information were imposed to ensure continued, close monitoring of the venture's future operations.

As a result of the public comments received and our further analysis, the Commission has determined to broaden slightly both the scope of prohibited information exchanges and the record-keeping requirements by adding product development and engineering activities to the other categories of restricted information. Although this modification may result in some additional burden to the venture and its parent firms, the additional relief appears warranted to ensure that the Fremont venture is in fact confined to its efficiency-enhancing effects. The combined effect of the consent agreement provisions will permit the Commission to monitor the venture's conduct and to detect possible antitrust problems in sufficient time to prevent any (potential) anticompetitive effects.

Against these concerns, it is important to weigh the three major procompetitive benefits that are likely to result from the joint venture. First, the Fremont venture will increase the total number of small cars available in America, thus allowing consumers a greater choice at lower prices, despite present restrictions on Japanese imports. Second, the joint venture car will cost less to produce than if GM were forced to rely immediately on some other production source. Finally, the joint venture offers a valuable opportunity for GM to complete its learning of more efficient Japanese manufacturing and management techniques. Moreover, to the extent the Fremont venture demonstrates the Japanese system can be successfully adapted to the United States, the venture should lead to the development of a more efficient and competitive U.S. industry. Evidence obtained during the Commission's investigation persuasively establishes that a successful experiment at Fremont could serve as a predicate for other domestic auto makers and their unionized employees to work out similar flexibility in work rules and practices.

As indicated by the staff memoranda and consultants' reports that were placed on the public record, the Commission's review of the Fremont venture has been thorough and painstaking. The attorneys and economists who investigated the joint venture should be commended both for the quality of their analysis and the professionalism that they have shown in carrying out their duties despite intense public interest in this matter and grossly distorted criticism from some quarters. The public comments received concerning provisional acceptance of the consent agreement contain no new information or analyses to alter the Commission's preliminary determination that, with the safeguards incorporated in the modified consent agreement, the Fremont venture offers substantial benefits to competition and U.S. consumers without incurring significant anticompetitive risks. To ensure these benefits are realized by American industry and American consumers, I have voted to give final acceptance to the consent agreement as modified.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

The Commission's final acceptance of this consent agreement is a gift from the American public to GM and Toyota's shareholders and Toyota's workers. Based on highly speculative "learning efficiencies," which—if they exist to any degree—are obtainable in less anticompetitive ways, the Commission has approved an arrangement whereby GM and Toyota will cooperate in setting price levels as well as sharing information about the most sensitive commercial subjects. Aside from setting a new antitrust standard—one which allows virtually any automobile production joint venture imaginable—the most likely result is upward pressure on GM and Toyota automobile prices, with other manufacturers' prices following along.

I agree with the majority on one point: the comments received did not raise questions about any of the fundamental factual assumptions which led three Commissioners to hail the joint venture as a boon to productivity and two Commissioners to protest it as likely to reduce competition. In my view, the conclusion that GM can accomplish any legitimate objectives of the joint venture through less harmful ways is as sound as ever. The question—why Toyota rather than a smaller Japanese partner—remains unanswered. The Bureau of Economics provides speculative estimates of the marginal gain from GM's joining hands with Toyota, as opposed to Isuzu or others, but these estimates deserve the healthiest of skepticism. They are based on the highly unrealistic assumption that Toyota's lower cost structure can be transferred intact to U.S. assembly.

A key to the frailty of the assumption that a Toyota partnership is unique is illustrated by Ford and Chrysler's argument that, if Toyota's technology were really so special, the acquisition of this essential knowledge by the leading American firm might be anticompetitive in itself. Staff's answer is that: "There are other very practical ways for [Ford and Chrysler] to learn Japanese methods . . . for example, a joint venture with Mitsubishi." (BC staff memo at 15) In other words, our staff would like to have it both ways: Toyota's technology is so unique that GM should be allowed to choose it as a partner in spite of competitive risks, but it is *not* so special that Ford and Chrysler can't learn essentially the same technology in other ways.

The key role of the import quotas is also reconfirmed in staff's latest analysis. The voluntary restraint agreement prevents other Japanese manufacturers from offsetting price increases which stem from any price coordination between GM and Toyota and helps protect the American oligopoly from more vigorous price competition. This buffer against competition is a major reason Toyota dealers are able to charge a premium of $2,000 to $4,000 above list price. Further, staff predicts that import restraints are unlikely to disappear quickly: "As long as the Japanese cost advantage remains substantial, Japanese automobile exports seem likely to be limited in some fashion, *i.e.* an extended VRA, a legislated import quota, or domestic content requirements." (BC staff memo at 11).

But, aside from the fact that the VRA increases the anticompetitive potential of the joint venture, what is its relevance to antitrust analysis? The staff continues to justify the joint venture, in part, because it *evades* the VRA: ". . . the joint venture *does* increase the mix of small cars available to the American public by circumventing existing, and probable future, import limitations." (BC staff memo at 11) I cannot accept this line of reasoning, which amounts to elevating the evasion of national policy to an antitrust defense.

The staff's analysis contains other speculative assertions to support the notion that there were no reasonable alternatives to GM's joining hands with Toyota. For example, staff argues that a joint venture with Isuzu would not produce the same "labor demonstration effects" as a GM-Toyota venture because, since GM owns a substantial share of Isuzu, the "UAW would likely perceive Isuzu as GM's 'alter ego' under the labor laws, and be unwilling to grant significant concessions." (BC staff memo at 17) The staff does not provide evidence for this theorizing about the fundamentally different reactions of the UAW to a GM-Toyota rather than GM-Isuzu joint venture, and I suspect the argument is principally speculation.

The Modification

The prospective futility of the consent agreement is highlighted by the modification to the order. All the Commissioners, I believe, agree that the risks to competition from the joint venture stem primarily from information exchanges, involving price, output decisions, product innovation, marketing plans, etc. In recognition of the fact that sensitive information is *inherent* in the venture, the consent agreement does not—and logically cannot if the venture is allowed to proceed—prevent this type of information exchange. Consequently, the agreement requires GM and Toyota to keep records of communications about model changes, design changes, product designs, sales or production forecasts or plans, and costs of GM or Toyota products supplied to the joint venture. (*See* paragraph V and VI of the order)

The modification approved by the Commission adds "development or engineering activities" to this list of types of communications for which records must be kept. The fact is, however, we could ask GM and Toyota to keep records on *all* communications about *any* subject and the result would be file cabinets of documentation of information exchange that is likely to reduce competition between the two companies but which will not be prohibited under the order because they are part and parcel of the joint venture. Moreover, the record of information exchanges is certain to reflect a carefully condensed version of information transfers, one that will not necessarily indicate fully the subject and scope of the exchange. Further, we can assume some information exchanges will be informal and casual and, despite good faith of the companies' compliance officers, never be memorialized in the required records. I do not question the sincerity of the Commission staff in making this modification, but it should provide little comfort to the public.

Early Termination

A troubling aspect of the Commission's procedure in this case is the granting of "early termination," that is, the Commission's decision to terminate the waiting period provided in the Hart-Scott-Rodino Act so that GM and Toyota could consummate their transaction even though the waiting period had not expired. Except for a cryptic reference in the *Federal Register* of March 2, 1984 [49 FR 7870] which even reporters following this matter closely missed, the decision to grant early termination was never announced by the Commission or the companies. Despite the arguments of the Chairman and the Bureau Director, I believe the Commission's affirmatively allowing GM and Toyota to consummate the venture weeks before final acceptance of the agreement, and in fact before the end of the comment period, effectively foreclosed our ability to obtain a preliminary injunction if the Commission had decided to reject the agreement. Even though that issue is now moot, since the agreement has become final, the issue of when the Commission grants early termination will arise again and deserves close examination by staff within the Commission and by outside observers.

Conclusion

In summary, the basic issues are the same. Everyone recognizes significant antitrust risks. Otherwise there would be no need for the consent agreement. However, the majority of the Commission insists that the benefits of GM learning Toyota's production techniques—and the marginal benefit of learning from Toyota rather than another partner—outweighs these risks. I continue to believe that the Commission has underestimated the likelihood of price coordination and risks to competition and, further, that any learning through joint production can be accomplished in less harmful ways. The principal incentives driving this joint venture are 1) the ability of GM to obtain, at lower cost than building on its own, a popular and high quality car, built principally in Japan, to carry the GM nameplate; and 2) the ability of Toyota to achieve profits from sales of components and cars in the U.S. despite the voluntary restraint agreement. These are perfectly understandable objectives, but the antitrust laws exist to redirect business behavior when what is good for individual companies is not good for everyone else.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY

The Commission received a great number of public comments on this matter, but I agree that they produced no significant new information or analysis. That being so, I see no reason to modify my original conclusion that this combination of two powerful and direct competitors cannot be sanctioned under the antitrust laws. The management "efficiencies" which supposedly justify it are not the sort of cost savings which merit the discretionary consideration of antitrust enforcers, and the value ascribed to them is more a product of friendly guesswork than verifiable calculation. The consent order does not prevent information exchanges on numerous competitively sensitive subjects, and it embodies a formula for establishing the wholesale price for the joint venture car which is very likely to reduce retail price competition between GM and Toyota.

Thus, the concerns which led me to dissent from the initial acceptance of the consent agreement in this matter remain valid, and I attach here a copy of the statement I issued at that time.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY

DECEMBER 22, 1983

The Commission majority has today voted to accept a consent agreement with the General Motors and Toyota Motor Corporation which does not cure the antitrust infirmities of their proposed joint venture. I have, therefore, dissented from that decision.

I am acutely aware of the arguments favoring this joint venture. Certainly any knowledgeable observer would agree that American car companies, facing stiff foreign competition in the United States market, need to improve production techniques in order to strengthen their competitive positions into the future. The decision for this Commission, however, is whether a joint venture such as that proposed by these companies is sanctioned by the nation's antitrust laws. I do not believe by any stretch of the imagination that it is. Whether it *should* be is not for me to say. That argument should be posed in another forum.

In any event, to claim that the consent agreement accepted today, which allows a partial combination of the first and third largest car companies in the world, solves any perceived antitrust problems with the venture, is simply, in my view, not the case. Indeed, both companies have acknowledged publicly that the consent merely restates the essential conditions of their original agreement.[1]

The reasons for my decision in this matter are summarized below.

Effect of precedent

There should be no mistake about the effect of the Commission's decision today. The principles of legality for this joint venture cannot be limited to one hermetically sealed experiment in Freemont, California. This joint venture is between the largest U.S. car producer and the largest Japanese car producer—both price-leaders for their makes of cars; thus, any similarly-structured joint venture between any other members of the industry must be sanctioned. How could we deny to other companies what we have authorized for the industry giants? In effect, this is rule-making for the industry.

It is predictable that several features of this joint venture will result in a reduction of competitive vigor between GM and Toyota. Concern about that should deepen when the strong likelihood that these features will be copied in "me-too" joint ventures between the remaining domestic car companies and foreign partners is considered. This joint venture, then, must be seen as a prototype for the industry that may well produce changes which are quantitatively more significant than those caused by it alone. The auto industry is clearly undergoing a concentration trend; the question is whether the Federal Trade Commission should accelerate that process by an action which will almost inevitably touch off a reactive pattern of strategic pairing between car manufacturers. That is especially a troubling concern since the purpose behind these cooperative ventures would not be the creation of a new competitor, but rather a decrease in the overall number of market participants, leading to increased likelihood of tacit, if not actual, collusion.[2]

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[1] *See, e.g., New York Times*, December 21, [illegible]83, p. D1 "If it gives them [the FTC] some comfort and seals the deal, then it's OK." (quoting General Motors Chairman Roger Smith); *Washington Post*, December 21, 1983, p. D1 "The precise terms of the order . . . are likely to include no more than a written agreement to abide by three elements of the venture that have already been publicly announced." (According to Toyota's U.S. Counsel.)

Nature of the transaction

Some joint ventures can be highly pro-competitive, although this is not likely to be one of them. Particularly prized are ventures where the combination of the parent firms' resources achieves what neither can manage alone: an increase in pure research, a technological breakthrough, product innovation, or entry into a new market.[3] This joint venture has none of those output-enhancing features. Manifestly, neither GM nor Toyota is a new entrant into the automobile market. The car to be produced by this joint venture likewise is nothing new: it is a derivative of Toyota's Corolla. The design differences between the two models are "modest" and beneath the sheet metal the cars will be "essentially identical." (BC staff memo, I, 10)

On its face the GM/Toyota arrangement falls into the most suspect category of joint ventures:

> Of all joint ventures, the horizontal is inherently the most anticompetitive, because it involves the formation of a joint venture in the markets in which the parents operate. Under such circumstances, antitrust compliance and enforcement problems are acute: if the arrangement is allowed to operate at all, the parents, through their representatives in the joint venture, will necessarily agree on prices and output in the very market in which they themselves operate. Brodley, *supra*, 95 Harv. L. Rev. at 1522.

Or, as another commentator puts it:

> When one or both parent firms actively compete in the same product and geographic market as the joint venture, the inevitable coordination of competitive activities between parent and partly-owned subsidiary and the resultant stifling of aggressive behavior of the joint venture should be treated under typical cartel rules. Pitofsky, *supra*, 82 Harv. L. Rev. at 1035–1036.

Initial concerns about the joint venture's anticompetitive potential are only intensified when it is analyzed in its market context. Our economic and legal staffs have calculated the Herfindahl indices for various probable markets. They range from a low of 1262 (dollar sales, subcompact cars) to a high of 2413 (unit sales, all cars). (BC staff memo VI, 9; BE memo, Appendix H). This means that a plausible market is at best moderately concentrated, and at worst highly concentrated—but in any event structured in a way which mandates a very hard look at any combination of competitors. Entry barriers to this market are obviously quite high, consisting of economies of scale in production and distribution and, for foreign car manufacturers, import limitations. (BC staff memo VI, 22, 26). Within this oligopolistic market, GM holds the longstanding leading market share (44% as compared with the 16.7% of its closest rival, Ford) and is the price leader among domestic auto producers. (BC staff memo, VI 10, 12)[4] Toyota holds the same price leader position among Japanese importers. (BE staff memo, VI,

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[2] Professor Pitofsky has observed that a market setting with numerous joint ventures raises particular antitrust concerns. Pitofsky, Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of *Penn-Olin*, 82 Harv. L. Rev., 1007, 1033 (1969).

[3] U.S. Department of Justice Antitrust Guide Concerning Research Joint Ventures, 466 CCH Trade Reg. Reports, 35 (December 1, 1980); Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev., 1523 (1982); Pitofsky, *op. cit.*

[4] General Motors is clearly the price leader among domestic auto producers, both because it announces prices first and because its prices virtually dictate Ford and Chrysler decisions. (BC staff memo, VI, 12)

15). Toyota is the fourth largest car manufacturer in the U.S. and the third largest in the world. (BC staff memo, III, 1).[5]

In short, this is a market which is prone to effective collusion, and a collaboration between two major competitors resembles a partial merger more than a true joint venture. In these circumstances the degree of anticompetitive risk and the genuine need for the venture must be stringently examined. *See, e.g., U.S. v. Penn-Olin*, 378 U.S. 158, 170–72 (1964); *Brunswick Corp.*, 94 F.T.C. 1174, 1265–66 (1979), *aff'd and modified on other grounds sub. nom., Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 1768 (1982).

Anticompetitive Risks

The two principal aspects of the joint venture which I fear will lead to blunted competition between the two companies are the transfer price formula and the ongoing exchange of a broad range of product planning, engineering design, and marketing information.

The price which the joint venture will charge GM for the car is calculated by a formula which consists of a weighted average of wholesale prices of competitive small cars. Toyota's Corolla is given special weight in the formula. Simply between GM and Toyota this formula reduces price competition, because any price cuts Toyota gives its dealers must be passed on to GM, with a corresponding reduction in Toyota's joint venture profits. Consequently, Toyota's incentives are to raise the Corolla price, knowing that such a price rise is incorporated into the cost of the joint venture car to GM; and knowing, moreover, that both it and GM are the industry price leaders, so that competitors are likely to match the higher prices. The competitors' price hikes in turn are reflected in the transfer price formula—and so the formula assures an ascending spiral of lockstep pricing,[6] although without explicit cooperation or collusion.[7]

It is important to note that infirm price competition between the Corolla and the joint venture car can infect the prices on other car models. Car manufacturers who offer a full line of cars maintain price differentials between various carlines and models. (BC staff memo, VIII, 12). GM will undoubtedly follow this practice and seek to keep a consistent dollar gap between the joint venture car and the next biggest model, and between each model further up the line. Thus a rise in the price of the joint venture car will force reactive price rises all the way up the GM line and, because of GM's price-leader position, the same ripple effect can be expected in competitive car lines. Consumers will still be offered a choice of prices, but the overall level of price competition will be artificially elevated.

The Bureau of Competition Director has dismissed the price rises flowing from the transfer formula as too small to worry about. However, the problem is not so much how much prices rise, but the fact that there has been a major change in car manufacturers' incentives to engage in price competition. Because there will be several new disincentives to price competition at work in the market, cartel stability will be encouraged.

Alternatives to this competitor-based pricing formula apparently were never explored by the parties. (BC staff memo, VIII, 7). The consent does not cover the matter at all. In particular, there has been no consideration of an alternative, suggested by Professor Salop, of a price escalator provision that is triggered by a cost index which is not under Toyota's control yet is highly correlated with Toyota's costs. Such indexed contracts have been used for the purchase of major car components[6] and are apparently common to various industries. I fail to see why the Commission was not provided with a comparative analysis of all practical pricing formulae.

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[5] In the subcompact portion of the U.S. market which is most directly affected by this joint venture, Ford, Toyota and GM are ranked respectively first, second and third, with the following market shares: 19.10%, 16.06%, 14.41%. (BC staff memo, VI, 96).

[6] The phrase "lockstep" pricing was first used by one of Toyota's counsel when describing to his client a probable effect of the transfer price formula. (GM 25945, quoted in Koch memo, 30)

[7] For a more vigorous analysis of this phenomenon, see the comments of John Kwoka (Professor of Economics, George Washington University; Consultant to the F.T.C.) and Steven C. Salop (Professor of Economics, Georgetown University Law Center; Consultant to the Chrysler Corporation).

Finally, I should point out that the transfer price formula is a bit of a red herring, since the agreement between GM and Toyota allows them to negotiate directly an appropriate selling price whenever the transfer formula yields a selling price which is at significant variance with then current market conditions. The consent agreement would not prevent operation of this proviso.

Unfortunately, even if a well-drafted consent could cure the transfer price infirmities of this joint venture, I would still object to it. That is because I see the overriding problem as incurable. This joint venture, by its very nature, necessitates coordination of GM and Toyota product marketing and research efforts. The joint venture will produce a car for GM which is manufactured according to Toyota production techniques. The most significant components of the car, representing well over half the value of all its parts and material, will be produced by Toyota. How could the joint venture not act as a clearinghouse for exchanges between customer (GM) and supplier (Toyota) as to what the end product should and could be? The twelve-year life of the joint venture covers two complete model cycles, and certainly there are a host of changes in car features from year to year. Improvements in the vehicle's designs and technology will be known to the parent companies well in advance of public announcements or even industry gossip. Moreover many features on small cars are common to large portions of the entire fleet; therefore knowledge that either parent can produce, say, extended corrosion protection or a significantly lighter engine, gives a window onto overall marketing strategies, not "just" plans for compact and subcompact cars.

It has been argued that GM and Toyota are such fierce competitors that they will jealously guard all their secrets. This argument ignores the fact that, even if a major technological breakthrough or some other "hush hush" project were carefully isolated, merely in the legitimate daily operations of the joint venture GM and Toyota can glean enough additional hard data to vastly improve educated guesses about each other's competitive activities. There does not have to be a complete swap of technical plans for competition to be dulled. For example, in the course of negotiations, Toyota has *already* supplied GM with certain detailed product information which otherwise would certainly not be exchanged between these competitors. (BC staff memo, VIII 17–18; Kwoka, 37–38) It may be too late for GM to match certain technological improvements, but it certainly can adjust its marketing efforts to defuse any Toyota impact. This would leave it free to focus its competitive energies on car companies other than Toyota—a strategic luxury not available to Ford, Honda, Chrysler *et al.*

As a final example of why I have trouble accepting this rosy picture of uncompromising competitors who will never be tempted to do each other favors, consider that Toyota *has already offered, and GM has acted upon,* suggestions on retail price differentials for the joint venture car relative to the Corolla. (BC staff memo, VIII, 18–19; Kwoka, 38–39).

I cannot improve upon the BC staff's summary of these instances of the most competitively sensitive information exchange:

> The point here is that the joint venture facilitates discussions about price that GM conceded were forbidden and this is the only example we happen to know about; should the joint venture proceed, others may well occur due to the introduction of new models and/or changes in the product itself. . . . Concern over the occasion and

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[6] For example, Chrysler has furnished us with examples of two such contracts which it has with Mitsubishi and Volkswagen, both for the supply of automotive engines.

necessity for such information exchanges arises again when a new joint venture model needs to be negotiated after several years. (BC staff memo, VIII, 19).

The consent agreement does not cure this problem. It specifically allows the parties to exchange information "necessary to accomplish . . . the legitimate purposes of functioning of the Joint Venture." This is a highly significant loophole. What is "necessary" or "legitimate" is determined in the first instance by GM and Toyota. Their threshold sensitivity on these points is demonstrated by the fact that GM's counsel has represented that the information exchanges I just described were not used for any purpose other than determining suitable product options for the joint venture. (BC staff memo, VIII, 17–18).

Alleged Procompetitive Benefits

We are assured that the joint venture will produce "efficiencies" which will offset any anticompetitive effects such as I have described above. In the FTC merger guidelines we defined an efficiency as a cost saving that could not be obtained unilaterally by either company, but instead required a pooling of resources. The efficiencies alleged in this matter do not meet even that general description.

Staff of the Bureau of Economics conclude that the joint venture will increase industry output and is therefore procompetitive. Such a conclusion, I note, requires a rejection of GM's own estimates to the contrary. Nonetheless, I am not convinced that staff has proved this social efficiency, as distinct from private benefits to GM and Toyota. There is no doubt that GM could use a new small car in order to maintain or increase market share in the compact/subcompact market, as well as to safeguard its large car sales by accrual of CAFE credits.[9] However, it is highly doubtful that the GM/Toyota venture arrangement represents additional output that would not come into being without the joint venture. The best evidence on this point is GM's own predictions that the sales of the joint venture car will come largely at the expense of other GM and Toyota vehicles. The joint venture car is expected to divert sales especially from GM's Chevette and mid-size "J" car. (BE staff memo, VIII, 3-4; Kwoka memo, 51) Our economics staff finds "somewhat puzzling" that GM assumes *no* net increase in industry sales as a result of the joint venture, and deals with the puzzle by summarily rejecting GM's estimates and producing its own competitive supply and demand models. (BE staff memo, VIII, 5–14). I am troubled by this willingness to set aside a damaging admission, as well as by several of the assumptions underlying the BE calculations.[10] Also, regardless of what minimal[11] output effects the joint venture may have, those same effects could be achieved in large part through alternatives. As Professor Kwoka demonstrates, absent the joint venture GM would very likely satisfy its small car needs by a variety of options, including domestic assembly of the 'R' car now being produced by GM's Japanese affiliate Isuzu, and improving and retaining the Chevette. (Kwoka memo, 47–55A; Muris memo, 31). Similarly, though with less certainty, we can predict that Toyota would have to pursue U.S. manufacturing options, absent the joint venture. (Toyota's two largest Japanese rivals, Honda and Nissan, have already taken that step.) Naturally these options are more expensive and presumably not as attractive to the companies, but from an overall industry viewpoint they are preferable to simply letting GM acquire 200,000 units of Toyota's production capacity for twelve years.

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[9] The Corporate Average Fuel Economy ("CAFE") statute, part of the Energy Policy and Conservation Act of 1975, sets annually escalating efficiency standards for the average of each domestic car manufacturer's fleet. The law provides stiff fines for failure to meet the standard. CAFE essentially conditions the sale of a larger car on the sale of a small car. Firms need to lower their fleet average and so continue selling the more profitable large cars.

[10] *See* critique in Koch memo, pp. 36–39; alternate calculations by Professor Kwoka at 31–35, 44–55.

[11] Ironically, BE's favorite justification for the joint venture has been hamstrung by the only provision of the consent which changes the original obligations of the parties. The formerly open-ended production commitment has been capped at 200,000 cars.

The second major[12] justification for the joint venture translates even less easily into an "efficiency" benefit. That is the claim that GM needs to have "hands-on" experience with Japanese management techniques in order to produce a cheaper car. No one denies that the Japanese have a significant cost advantage (approximately $2000) in the production of cars. However, it is not possible to isolate and quantify many of the sources of that advantage, other than differences between labor wages in the automotive industries of the U.S. and Japan, which account for 40% of the cost advantage. (Kwoka memo, 11). GM concedes that Japanese advantage does not derive from superior products or manufacturing hardware. I must ask therefore, regardless of what value we assign to management skills, whether the fact that they differ justifies this sort of close cooperation between rivals. For example, if Ford had a 30% cost advantage over GM, attributable solely to some Ford management mystique, would the antitrust laws permit GM to learn Ford's special production techniques by jointly producing a Lincoln/Cadillac-type car? I think not.

Conclusion

In summary, then, if this joint venture between the world's first and third largest automobile companies does not violate the antitrust laws, what does the Commission think will? This is surely the question that potential joint venture partners will be asking themselves. In this decision, the Commission has swept another set of generally recognized antitrust law principles into the dustbin, using again the incorporeal economic rhetoric that now dominates Commission decision-making. In this case, the decision results in the blessing of a business proposal that is both breathtaking in its audacity and mind-numbing in its implications for future joint ventures between leading U.S. firms and major foreign competitors that seek to lend a friendly helping hand.

Perhaps in uneasy recognition of the controversy this antitrust generosity would otherwise ignite, the majority has thrown Br'er Rabbit into the briar patch by penciling in a last minute consent order that the proposed joint venture partners have themselves said merely restates the main features of the private agreement already existing between them. This will fool no one who has even a passing familiarity with the real issues in this antitrust decision.

STATEMENT OF COMMISSIONER GEORGE W. DOUGLAS

The Federal Trade Commission has always viewed with utmost seriousness its commitment to consider the public's comments prior to issuing consent orders. The Commission's concern is particularly relevant in matters such as this, where many believe that the Commission's decision will have ramifications that transcend by far the immediate interests of the directly affected parties.

Although the Commission received in excess of a hundred individual comments following the announcement of its preliminary decision, it is significant that none of the comments raised any new facts or concerns that had not already been discussed and analyzed at length by both the Commission and its staff. Given the diversity of public opinion and the heterogeneity of interests in this matter, the fact that no new issues have been raised by the public comments is testimony, I believe, to the thoroughness and objectivity of our staff's analyses.

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[12] GM has characterized the learning experience as the primary goal of the joint venture; BC staff is skeptical as to its value. (BC staff memo, II, 31–40, 48–52).

Prior to coming to its decision, the Commission reviewed and analyzed an extensive collection of documentary evidence, outside submissions, and exhaustive staff analyses. Because of the unique circumstances surrounding this case, edited versions of that material has been made available to the public. In its review of this material the Commission was confronted—perhaps to a degree never previously encountered—with a host of intriguing and thorny concerns touching upon such issues as international trade policy, labor relations, and local employment conditions, among others—many of which went far beyond the customary bounds of traditional antitrust concerns.

Wisely, I believe, the Commission eschewed entanglement in these side issues and focused on the factual evidence relating to the joint venture's potential effects on competition. With this as a reference standard, the Commission, following its review of the evidence, was unwilling to approve the joint venture unless General Motors and Toyota agreed to institute several important anticompetitive safeguards limiting information exchanges and the number of automobiles that would be made available to General Motors. It is significant that only after these safeguards were agreed to by the two partners would the Commission give its tentative approval to the joint venture.

The Commission's action today promises substantial benefits for American consumers, for American labor, and for the American manufacturing sector in general.

The American car-buying public stands to benefit because the joint venture serves to increase both the total number of small cars available to the public and domestic small car manufacturing capacity. This increase in domestic productive capacity and productive efficiency will enhance competition in the sale of small cars and strengthen the competitive posture of American automobile manufacturers.

While the majority of the Commission remains convinced that the procompetitive effects of this joint venture overwhelm any of the possible anticompetitive concerns that have been raised in this matter, I should caution against the drawing of any undue inferences from today's decision. Each case that comes before the Commission is analyzed and decided upon based on its own merits, and it should go without saying that the circumstances in this case are sufficiently unique as to augur against making any inferences as to how the Commission might view other production joint ventures.

STATEMENT OF COMMISSIONER TERRY CALVANI

On December 22, 1983, I voted in favor of provisionally accepting a consent agreement to permit General Motors Corporation and Toyota Motor Corporation to engage in a limited manufacturing joint venture in Fremont, California. At that time, I indicated that I looked forward to receiving and reviewing public comments on the joint venture under the Hart-Scott-Rodino Act procedures and Commission rules. The Commission has received over one hundred comments on the provisionally accepted consent order. After carefully reviewing those comments, several things are apparent. First, the Staff has done an exhaustive job analyzing the competitive aspects of the joint venture. The major concerns raised in the comments had already been identified by the Staff in their investigation, and the resulting consent order addressed virtually all of these concerns. Second, to the extent anyone feared the proposed consent will not prevent collusion between General Motors and Toyota, the modification adopted today should allay those fears. Limiting information exchanges between the two companies in product development and engineering to communications necessary for producing the joint venture vehicle closes the only potential channel for collusion not covered by the proposed consent. Moreover, the record keeping requirements associated with this change provide an effective method for monitoring compliance.

Although the joint venture presents some potential antitrust problems, the modified consent order addresses the major antitrust concerns that arise from the joint venture. The modified consent prevents collusion between the companies in long term strategic planning as well as in the short term, without unduly interfering with the substantial procompetitive benefits that I believe will result from the joint venture.

IN THE MATTER OF

RENTACOLOR, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9163. Complaint, Nov. 1, 1982—Final Order, April 16, 1984

This order requires two Newington, Conn. firms engaged in the public leasing of color television sets and other video equipment, among other things, to cease representing in advertising the amount of any payment, the number of payments required, or that no downpayment or other payment is required at the consummation of a lease, without also including the disclosures required by the Consumer Leasing Act and Sections 213.4 and 213.5 of Regulation M. The order additionally bars the companies from failing to properly include statutorily-required disclosures in contracts and other leasing instruments; and dismisses the complaint against the individual respondent.

Appearances

For the Commission: *Ronald G. Issac* and *Justin Dingfelder.*

For the respondents: *Basil J. Mezines* and *Michael G. Charapp, Stein, Mitchell & Mezines,* Washington, D.C. and *Brandon J. Hickey, Murtha, Cullina, Richter and Pinney,* Hartford, Conn.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Rentacolor, Inc., a corporation, Rentacolor U.S.A., Inc., a corporation, and Brian N. Cawley, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rentacolor, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 3549 Atlantic Avenue, Long Beach, California.

Respondent Rentacolor U.S.A., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 262 Hartford Avenue, Newington, Connecticut.

Respondent Brian N. Cawley is president of each of the corporate respondents. He formulates, directs and controls the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent Rentacolor U.S.A., Inc. [2]

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the renting of color television sets and other video equipment to the public. The products are generally leased on a 12-month basis (although there are a few leases on a 3 or 6-month basis). The customer can terminate the lease by giving the respondents 30 days notice at any time after the initial term of the lease is over.

PAR. 3. In the ordinary course of their business as aforesaid, respondents regularly lease, or offer to lease video equipment by means of a consumer lease, as "consumer lease" is defined in Section 226.2(mm) [213.2(a)(6)] of Regulation Z[M], the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System [Cited in brackets is the revised Federal Reserve Board citation which may be used after April 1, 1981 and becomes mandatory after October 1, 1982].

PAR. 4. Subsequent to March 23, 1977, the effective date of the Consumer Leasing Act, respondents have caused to be published advertisements, as "advertisement" is defined in Section 226.2(d) [213.2(a)(2)] of Regulation Z[M], to aid, promote, or assist directly or indirectly their consumer leases. Certain of these advertisements have stated the amount of the periodic payment involved or that no downpayment is required without also stating each of the following:

1. That the transaction advertised is a lease, as required by Section 226.10(g)(1) [213.5(c)(1)] of Regulation Z[M];

2. The total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required, as prescribed by Section 226.10(g)(2) [213.5(c)(2)] of Regulation Z[M];

3. The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease, as required by Section 226.10(g)(3) [213.5(c)(3)] of Regulation Z[M]; and

4. A statement of whether or not the lessee has the option to purchase the leased property and at what price and time, as required by Section 226.10(g)(4) [213.5(c)(4)] of Regulation Z[M]. [3]

PAR. 5. Subsequent to March 23, 1977, respondents, in the ordinary course of their business, have caused, and are now causing, their customers to execute lease agreements that bind the customer for a stated minimum term, usually 12 months. Respondents disclose certain cost information on the face of the lease contract above the place for the customer's signature. Certain other required lease information is disclosed on the reverse side of the lease contract.

By and through the aforementioned practice, respondents have, in certain instances:

1. Failed to make all of the required disclosures together, as required by Section 226.15(a) [213.4(a)(2)] of Regulation Z[M], on either:

(a) the contract or other instrument evidencing the lease on the same page and above the place for the lessee's signature; or

(b) a separate statement which identifies the lease transaction;

2. Failed to disclose the total amount of the periodic payments scheduled under the lease, as required by Section 226.15(b)(3) [213.4(g)(3)] of Regulation Z[M]; and

3. Failed to disclose whether or not the lessee has the option to purchase the leased property, as required by Section 226.15(b)(11) [213.4(g)(11)] of Regulation Z[M].

PAR. 6. Pursuant to Section 103(s) of the Truth in Lending Act, respondents' aforesaid failures to comply with Sections 226.10(g) [213.5(c)] and 226.15 [213.4] of Regulation Z[M] constitute violations of that Act and pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY

ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 15, 1983

PRELIMINARY STATEMENT

On November 1, 1982, the Federal Trade Commission issued its complaint in this matter alleging that the corporations Rentacolor, Inc. and Rentacolor U.S.A., Inc. (hereinafter sometimes referred to jointly as "Rentacolor") and their president, Brian N. Cawley, individually and as an officer of the aforesaid corporations (hereinafter sometimes referred to [2] collectively with Rentacolor as "respondents"), have violated Sections 226.10(g) and 226.15 of Regulation Z (12 C.F.R. 226),[1] the implementing regulation of the Truth in Lending Act

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[1] As a result of Congress' enactment of the Truth in Lending Simplification and Reform Act (Title VI of the

(footnote cont'd)

(15 U.S.C. 1601–1667), and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

The complaint alleges that subsequent to March 23, 1977, the effective date of the Consumer Leasing Act, respondents caused advertisements to be published to aid, promote, or assist their consumer leases. The advertisements stated either the amount of the periodic payment involved or that no downpayment was required without disclosing (i) that the advertised transaction was a lease, (ii) the total amount of any payment such as a security deposit or capitalized cost reduction required at the [3] consummation of the lease or that no such payments were required, (iii) the number, amounts, due dates or periods of scheduled payments under the lease and the total of such payments, and (iv) a statement of whether or not the lessee had the option to purchase the leased property and at what price and time, as required by Section 226.10(g) of Regulation Z. (Complaint ¶ 4)

The complaint also alleges that subsequent to March 23, 1977, respondents caused their customers to execute lease agreements that bind the customer for a stated minimum term, usually 12 months, and that failed to make all of the disclosures required by Section 226.15(a) of Regulation Z on either the same page of the lease contract and above the place for the lessee's signature, or on a separate statement identifying the lease transaction. Further, that the respondents failed to disclose, as required by Section 226.15(b) of Regulation Z, the total amount of the periodic payments scheduled under the lease and whether or not the lessee had the option to purchase the leased property. (Complaint ¶ 5)

The aforesaid alleged failures of respondents to comply with the provisions of Regulation Z are charged in the complaint as violations of the Truth in Lending Act and, pursuant to Section 108 of that Act, violations of the Federal Trade Commission Act. [4]

On January 3, 1983, respondents filed an Answer to the complaint denying all of the allegations of violations of law. Respondents also averred that (1) the complaint failed to state a claim upon which relief can be granted, (2) laches bar the Commission from maintaining this action, (3) the claim for relief is barred by the statute of limitations, (4) the Commission is estopped from seeking the relief sought in this proceeding, (5) the proceeding is not in the public interest because respondents' acts and practices are and have been for some time in

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Depository Institutions Deregulation and Monetary Control Act, Pub. L. No. 96-221, 94 Stat. 168) on March 31, 1980, the Board of Governors of the Federal Reserve System revised Regulation Z, effective April 1, 1981, and consolidated the consumer leasing provisions into a separate regulation, Regulation M (12 C.F.R. 213). The complaint issued in this case uses Regulation Z as the principal citation for the regulatory provisions alleged to have been violated because compliance with Regulation M did not become mandatory until October 1, 1982. Section 226.10(g) of Regulation Z has become Section 213.5(c) of Regulation M and Sections 226.15(a) and 226.15(b) of Regulation Z are now Sections 213.4(a) and 213.4(g), respectively, of Regulation M. There were no substantive changes to these or any of the other consumer leasing regulatory provisions.

the past in conformity with the Consumer Leasing Act, (6) the proceedings are not in the public interest because the alleged acts and practices have been abandoned or modified prior to issuance of the complaint with no reasonable likelihood of resumption, (7) the violations do not constitute a proper basis for the granting of any relief because they are infrequent, isolated, and *de minimus*, (8) Brian N. Cawley is not a person subject to the requirements of the Consumer Leasing Act, (9) the alleged lease transactions are not subject to the Consumer Leasing Act, (10) the alleged violations were not intentional and resulted from bona fide errors notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, and (11) the alleged acts or practices were committed in good faith and in conformity with rules, regulations, or interpretations by the Federal Reserve Board, or by an official [5] or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals.

On January 21, 1983, a prehearing conference was held to clarify the issues and to establish a plan and schedule of discovery. At the hearing, counsel for the parties agreed to attempt to negotiate a stipulation of facts to expedite resolution of the matter. On April 12, 1983, counsel for the parties filed a stipulation of facts and waived the right to a formal hearing and to the introduction of documents not cited in the stipulation. The record was closed for the reception of evidence on May 16, 1983.

This proceeding is now before the Administrative Law Judge for decision based upon the complaint, the answer, the stipulation of facts and accompanying documents, proposed findings of fact and conclusions of law, and legal memoranda submitted by the parties. These submissions have been given careful consideration and, to the extent not adopted herein in the form proposed or in substance, are rejected as not supported by the record or as immaterial. After review of the entire record in this proceeding, the Administrative Law Judge makes [6] the following findings of fact and conclusions, and issues the Order set out at the end hereof.[2]

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[2] The findings of fact include references to supporting evidentiary items in the record. The supporting evidence cited in each instance is not necessarily all-inclusive of the record evidence. The following abbreviations have been used:

F. – Findings of this Initial Decision followed by the number of the finding(s) being referenced.
Stip. – Stipulations filed by the parties followed by the number(s) of the paragraph being referenced.
CX – Exhibits incorporated in the Stipulations followed by the number(s) of the exhibit being referenced.
RPF – Respondents' Proposed Findings of Fact, Memorandum of Law, Conclusions of Law, and Order.
RB – Reply Brief of Respondents To Complaint Counsel's Proposed Findings of Fact, Supporting Brief, Conclusions of Law and Order.

I. Findings of Fact

A. *Identities And Business Of Respondents*

1. Respondent Rentacolor, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of [7] the State of California. (Answer ¶ 1) It began doing business in the United States in 1973 and, at the time of issuance of the complaint herein, was doing business in California, Connecticut, Massachusetts, and Pennsylvania, with its principal office and place of business located at 3549 Atlantic Avenue, Long Beach, California. (Stip. 1) After submission of the Stipulations herein, Rentacolor, Inc. ceased doing business in California and changed its business address to 262 Hartford Avenue, Newington, Connecticut. (RPF, p. 4) Rentacolor, Inc. is the wholly-owned subsidiary of Rentacolor International, which operates television rental companies in 22 countries throughout the world. (CX 4A)

2. Respondent Rentacolor U.S.A., Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut. (Answer ¶ 1) It began doing business in 1979 and currently does business in California, Pennsylvania, Maryland, Michigan, Illinois, and Connecticut, with its principal office and place of business located at 262 Hartford Avenue, Newington, Connecticut. (Stip. 2)[3] [8]

3. Brian N. Cawley is the president and the chief executive officer of both Rentacolor, Inc. and Rentacolor U.S.A., Inc. He also is a member of Rentacolor's Board of Directors. He served in both capacities during the time the alleged violations cited in the complaint occurred. (Stip. 3; CX 4A) The Board of Directors formulates policy for Rentacolor and, as president, Cawley is responsible for implementing that policy. (Stip. 3)

4. Respondents are now and for some time in the past have been regularly engaged in the leasing of color television sets and other video equipment to the public for personal, family, or household use. (Answer ¶ 2; Stip. 4)

B. *Federal Trade Commission Staff Contacts With Respondents*

5. The Federal Trade Commission staff ("the staff") first contacted Rentacolor concerning its leasing business by letter of December 11, 1979. (Stip. 8) Rentacolor responded to the staff's letter with a letter from its counsel dated February 13, 1980. The documents identified as CX 2 thru CX 10, or copies thereof, were submitted as attachments to Rentacolor's letter. (Stip. 9)

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[3] CX 14E, a copy of a Rentacolor advertisement, lists a New Jersey telephone number for New Jersey residents to dial. The record does not establish whether this advertisement was actually disseminated.

6. The staff subsequently contacted Rentacolor by letter dated March 6, 1980, to request that Rentacolor provide additional information concerning its operations and its corporate affiliations. (Stip. 10) Rentacolor's counsel [9] responded to this staff inquiry by letter dated March 21, 1980. (Stip. 11) Rentacolor's counsel sent the staff drafts of four new Rentacolor ads by letter dated March 27, 1980. The ads are identified as CX 14B–E. (Stip. 15)

7. On April 11, 1980, the staff met with Rentacolor's counsel and Brian N. Cawley to discuss Rentacolor's lease contract forms and its advertisements, and its plans for revising them. (Stip. 16) By letter dated April 23, 1980, Rentacolor's counsel sent the staff four more Rentacolor ads for its perusal. The ads are identified as CX 15B–E. (Stip. 17)

8. By letter of September 9, 1981, the staff again contacted Rentacolor. (Stip. 20) The documents identified as CX 19 thru CX 23 were mailed to the staff by Rentacolor's counsel under date of September 14, 1981, in response to the staff's letter of September 9, 1981. (Stip. 21)

9. On December 16, 1981, the staff met with Rentacolor's counsel and Brian N. Cawley in Washington, D.C. (Stip. 31) The Commission's complaint issued on November 1, 1982.

C. *Respondents' Lease Contracts*

10. From September 1979 to August 1980 and from August 1981 to the present, Rentacolor transacted lease agreements from [10] three to twelve months in duration. The majority of these lease agreements were for a minimum contractual period of twelve months. From August 1980 thru July 1981, Rentacolor transacted lease agreements solely for three months in duration. (Stip. 5; CX 4)

11. Rentacolor offers true operating leases. The contracts do not give the consumer the option to purchase the leased property. (Stip. 6; *see* CXs 5–6). Rentacolor charges an installation fee when the leased property is installed in the customer's home. The fee varies depending on the type of unit leased. (Stip. 7; *see* CX 6A)

12. Rentacolor U.S.A., Inc. uses and has always used the same lease contract forms that Rentacolor, Inc. uses. (Stip. 29)

13. Prior to August 1980, Rentacolor used the lease contract form identified as CX 5 to execute lease agreements with its customers. During this period, no other contract form was used. (Stip. 22; *see* CXs 6–10) Rentacolor began using the lease contract form identified as CX 22A–B in August 1980. (Stip. 23) Rentacolor began using the disclosure statement identified as CX 23 in July 1980. Prior to that time, no such disclosure statement was used. (Stip. 24) [11]

D. *Respondents' Advertisements*

14. Rentacolor U.S.A., Inc. and Rentacolor, Inc. use the same advertisements to promote their business. (Stip. 30)

15. CX 2, referring to a Rentacolor address in Wethersfield, Connecticut, and CX 3, referring to a Rentacolor address in New Britian, Connecticut, were mailed by Rentacolor to the staff by letter dated February 13, 1980. (Stip. 9; F. 5)

16. The advertisement identified as CX 11 was published in *The Washington Post TV* magazine for the week of December 2, 1979. (Stip. 12) The advertisement identified as CX 12 was published in *The Washington Post TV* magazine for the week of March 2, 1980. (Stip. 13) The advertisement identified as CX 13 was published in *The Washington Post TV* magazine for the week of March 30, 1980. (Stip. 14)

17. CX 14B–E are drafts of Rentacolor advertisements mailed by Rentacolor to the staff by letter dated March 27, 1980. (F. 6) By letter dated April 23, 1980, Rentacolor sent the staff four Rentacolor advertisements, which have been identified as CX 15B–E. (Stip. 17)

18. The advertisement identified as CX 15E was published in *The Washington Post TV* magazine for the week of May 11, 1980. CX 16 is a copy of the advertisement as published. (Stip. 18) [12]

19. The advertisement identified as CX 17 was published in *The Washington Post TV* magazine for the week of September 6, 1981. (Stip. 19) The advertisement identified as CX 20 was published in *The Hartford Courant TV Week* (CX 20A) and *The Detroit News TV* magazine (CX 20B) for the week of September 13, 1981, and in *TV Guide* magazine for the Washington, D. C. metropolitan area for the week of September 12–18, 1981 (CX 20). (Stip. 25) The advertisement identified as CX 21 was published in *The Washington Post TV* magazine (CX 21A) and *The Boston Globe TV* magazine (CX 21B) for the week of September 13, 1981. CX 20 and CX 21 differ only with respect to the positioning of the ad copy. (Stip. 26) The advertisement identified as CX 24 was published in *TV Guide* magazine for the Washington, D.C. metropolitan area for the week of October 10–16, 1981. (Stip. 27)

20. The advertisement identified as CX 25 was published in *The Philadelphia Inquirer TV Week* for the week of March 14, 1982. CX 24 and CX 25 differ from CX 20 and CX 21, respectively, only in that the former refer specifically to "a 19" TV." (Stip. 28)

21. On October 1, 1981, Rentacolor instructed its advertising agency to modify all ads which failed to include the [13] monthly lease charge so as to include the monthly lease charge. If the president of the advertising agency were to testify, he would state that he immediately instructed his staff to make the change requested by Rentacolor in such ads, that the change was immediately made for advertising to

appear in all publications except *The Philadelphia Inquirer TV Week*, and that the failure to make the change in *The Philadelphia Inquirer TV Week* was the result of inadvertence. Complaint counsel neither admit nor deny the truth of said president's prospective testimony. (Stip. 32)

E. *Respondents' Lease Contract Terms*

22. The consumer lease contracts identified as CX 6 thru CX 10 were executed during January and February, 1980, using respondents' standard lease contract form, CX 5. This contract form was used from September 1979 to August 1980. (Stip. 5, 9, 22; CX 4) The contracts obligate the lessee to lease the property for a minimum period of twelve months. (*See e.g.*, Item 10 of CX 6B) Item 10 of these contracts provides as follows:

> Renter may terminate this Agreement after twelve months of signing this Agreement by giving not less than four weeks' written notice of such intention to terminate; provided, however, that the date of termination must coincide with a date on which a payment hereunder is due and the [14] Apparatus must be returned to Owner on or before such termination date in a condition satisfactory to Owner; provided further, that any and all rental payments accruing on or before such termination date shall be paid by Renter prior thereto. The termination of this Agreement shall not affect any right Owner may have hereunder arising out of any act or omission of Renter occurring prior to the termination hereof.

There is no other provision for termination of the lease. Respondents have stipulated that these contracts are consumer lease contracts, as defined in Section 213.2(a)(6) of Regulation M, the implementing regulation of the Consumer Leasing Act [Section 226.2(mm) of Regulation Z]. (Stip. 9; Stip. 1, n. 1) Respondents have also stipulated that a majority of the lease agreements transacted during the period September 1979 to August 1980 and from August 1981 to the present were for twelve months duration. (Stip. 5)

23. On the contracts in use from September 1979 to August 1980, the place for the lessee's signature is located at the bottom of the front page of the contracts. (*See, e.g.*, Item 6 of CX 6A) There is no place for the lessee's signature on the back page of the contracts.

24. On the front page of the contracts, respondents give a brief description of the leased property (Item 3, CX 6A), disclose the number and amount of the monthly payments scheduled [15] under the lease (Item 5, CX 6A), and disclose the initial payment due under the lease. (Item 4, CX 6A) The initial payment is due prior to or at the time the contract is executed. (Item 2, CX 6B) An installation charge is imposed as part of the initial payment. (Item 4, CX 6A; Stip. 7)

25. On the back page of the contracts, respondents describe their

responsibility for servicing and maintaining the leased property. (Item 4, CX 6B) This information is not disclosed on the front page of the contracts. (CX 6A)

26. On the back page of the contracts, respondents disclose a 10% penalty on rent installments that have not been paid within 10 days of the due date (Item 2, CX 6B), and a $25 charge as liquidated damages in the event the lessee defaults. (Item 12, CX 6B) This information is not disclosed on the front page of the contracts. (CX 6A)

27. On the back page of the contracts, respondents state the conditions under which they may terminate the lease prior to the end of the scheduled lease term. (Items 11 and 12, CX 6B) This information is not disclosed on the front page of the contracts. (CX 6A)

28. Respondents fail to state in the contracts, the total amount of the monthly payments scheduled under the lease (CXs 6–[16]10), and whether or not the lessee has the option to purchase the leased property. (CXs 6–10)

29. Rentacolor began using the disclosure statement identified as CX 23 in July 1980. (Stip. 24) There is no contention that this disclosure statement does not comply with the Consumer Leasing Act.

F. *Respondents' Advertising Disclosures*

30. The Federal Trade Commission staff first contacted Rentacolor concerning its leasing practices by letter of December 11, 1979 (Stip. 8), which was subsequent to publication of the advertisement in *The Washington Post TV* magazine for the week of December 2, 1979, identified as CX 11. (Stip. 12) CX 11 is captioned "TEN REASONS WHY TV RENTAL IS A BETTER BUY THAN BUYING." One such reason given is that there is "No Downpayment." The ad also states, "Rental starts as low as $14.95 a month on a yearly basis." CX 11 does not state the number of payments scheduled under the advertised transaction, nor does it state the total amount of such payments. Further, there is no disclosure of whether the lessee has the option to purchase the advertised property, nor is there a statement identifying the advertised transaction as being a lease. Finally, there is nothing indicating that a charge is imposed for installing the advertised property. [17]

31. In response to the staff's letter of December 11, 1979, respondents submitted, by letter of February 13, 1980, copies of two Rentacolor advertisements, identified as CX 2 and CX 3. (Stip. 9) CX 2 depicts a Rentacolor employee delivering a television to a house where four men are standing inside the door, apparently preparing to watch a football game on the Rentacolor television. The advertisement states in part:

Sit back and enjoy all the action without a care. . . . There's no down payment . . . All repairs are free and done in home . . .

Monthly rental rates start at $14.95 a month,* and that's all you pay.

*On a yearly basis.

The ad does not identify the advertised transaction as a lease. The ad does not state the number of payments scheduled under the transaction, nor does it state the total amount of such payments. There is no disclosure of whether the lessee has the option to purchase the advertised property, and there is no disclosure of an installation charge.

32. CX 3 depicts a frowning man standing over a television and a caption, "If It Breaks Down, Call Us." The advertisement states: [18]

If the set ever needs repair we'll come to your home immediately. . . .

Prices start at $14.95 a month.

The advertisement does not state the total amount of any payment due upon consummation of the advertised transaction or that no such payment is required. The ad does not identify the advertised transaction as a lease. The ad does not state the number of payments scheduled under the transaction nor does it state the total amount of such payments. There is no disclosure of whether the lessee has the option to purchase the advertised property.

33. CX 2 shows an address for Rentacolor at 5 Hillcrest Avenue, Wethersfield, Ct., and lists two telephone numbers. CX 3 shows an address for Rentacolor at 116 Main Street, New Britian, Ct., and lists two telephone numbers. The record does not establish whether these two advertisements were ever disseminated.

34. The advertisement identified as CX 12 was published in *The Washington Post TV* magazine for the week of March 2, 1980. (Stip. 13) CX 12 depicts a Rentacolor employee polishing the screen of a television in a room where a man is sitting back in a chair smiling, with a pipe in his mouth and slippers on his feet. The caption reads, "Rent a New Color TV. And You'll Be Set For Life." The ad also states: [19]

Famous name color sets starting as low as $14.95 a month.* That one monthly payment covers everything. There's no downpayment or financing with Rentacolor.

*Based on 12 months.

The advertisement does not identify the advertised transaction as a lease; it does not state the number of payments scheduled under the transaction nor does it state the total amount of the monthly payments scheduled under the lease; it does not disclose whether the lessee has the option to purchase the advertised property; and there is no disclosure of an installation charge.

35. The advertisement identified as CX 13 was published in *The Washington Post TV* magazine for the week of March 30, 1980. (Stip. 14) The caption reads:

Rent a New Color TV. And Give Up Down Payments For Good.

The ad also states:

Call Rentacolor and spring for a new set for as little as $14.95 a month.*

*Based on yearly rental.

The ad does not identify the advertised transaction as a lease; it does not state the number of payments scheduled under the transaction, nor the total amount of such payments. There is no disclosure of whether the lessee has the option to purchase the advertised property, and there is no disclosure of an installation charge. [20]

36. The advertisements identified as CX 14B–E were sent to the FTC staff by respondents' counsel by letter dated March 27, 1980. (Stip. 15) The ads each state "No Down Payment" is required, and each discloses a monthly payment of $16.95. The ads do not identify the advertised transaction as a lease, and there is no disclosure of an installation charge. The record does not establish whether these advertisements were ever disseminated. CX 14B has a telephone number which indicates a location in the Washington, D.C. area. (*See* CX 13, which has the same telephone number, and was disseminated in *The Washington Post TV* magazine - Stip. 14.) CX 14E has a telephone number listed for New Jersey residents to dial.

37. On April 11, 1980, the staff met with Rentacolor's counsel and Brian N. Cawley to discuss respondents' lease contract forms and their advertisements and their plans for revising them. (Stip. 16) The advertisements identified as CX 2, CX 3, and CXs 11–14 were available to the staff and respondents at the time of the meeting.

38. The advertisements identified as CX 15B–E were sent to the staff by respondents' counsel with letter dated April 23, 1980. (Stip. 17) These advertisements make no disclosure of an [21] installation charge. The record does not establish whether the advertisements identified as CX 15B, CX 15C, and CX 15D were ever disseminated. CX 15E is identical to CX 16, which was disseminated in *The Washington Post TV* magazine for the week of May 11, 1980. (Stip. 18)

39. By letter of September 9, 1981, the FTC staff contacted respond-

ents again. (Stip. 20) This followed publication of the advertisement, identified as CX 17, in *The Washington Post TV* magazine for the week of September 6, 1981. (Stip. 19) CX 17 is captioned, "How to afford a $750 Video Cassette Recorder." The ad discloses a monthly payment of $39.95. The ad does not disclose the total amount of any payment due at consummation of the transaction or that no such payment is required.

40. The advertisements identified as CX 19 through CX 23 were mailed by respondents' counsel to the staff by letter dated September 14, 1981, in response to the staff's letter of September 9, 1981. (Stip. 21) The advertisement identified as CX 20A was published in *The Hartford Courant TV Week* for the week of September 13, 1981; CX 20B was published in *The Detroit News TV* magazine for the week of September 13, 1981; CX 20 was published in *TV Guide* magazine for the Washington, D.C. metropolitan area for the week of September 12–18, 1981. (Stip. 25) The advertisement identified as CX 21A was published [22] in *The Washington Post TV* magazine for the week of September 13, 1981; and the advertisement identified as CX 21B was published in *The Boston Globe TV* magazine for the week of September 13, 1981. (Stip. 26) CX 20 and CX 21 differ only with respect to the positioning of the ad copy. CX 20, CX 20A, CX 20B, CX 21, CX 21A, and CX 21B are captioned, "Why buy a new TV when renting is just 66¢ a day?" The ads all state:

> With Rentacolor, there's no down payment, . . . you simply make monthly no interest payments.

The ads do not disclose the amount of the monthly payments scheduled under the lease. Also, the ads do not disclose that a charge is imposed at the beginning of the lease for installation, or that no such charge is due.

41. The advertisement identified as CX 24 was published in *TV Guide* magazine for the Washington, D.C. metropolitan area for the week of October 10–16, 1981. (Stip. 27) The advertisement identified as CX 25 was published in *The Philadelphia Inquirer TV Week* for the week of March 14, 1982. (Stip. 28). CX 24 and CX 25 are captioned, "Why buy a 19" TV when renting is just 66¢ a day?" The ads state:

> With Rentacolor, there's no down payment . . . you simply make monthly no interest payments.

CX 24 and CX 25 differ from CX 20 and CX 21 only in that the caption in CX 24 and CX 25 refers specifically to a 19" TV. [23] (Stip. 28) Thus, CX 20, CX 20A, CX 20B, CX 21, CX 21A, CX 21B, CX 24 and CX 25 do not disclose the amount of the monthly payments scheduled under the lease, and the ads do not disclose that a charge is imposed at the beginning of the lease for installation, or that no such charge is due.

42. Respondents' advertisements were designed to aid, promote, and assist leases for personal, family, or household purposes. (*See, e.g.*, the illustrations in CX 12 and CX 16) CX 11 mentions "Service In Home," and "As long as you have Rentacolor in your home. . . ." (*See also*, CX 12, CX 13 ["service . . . in home"], CX 16 ["Immediate In-Home Service"], CX 17 [". . . start watching your favorite movies at home"], CX 20, CX 20A, CX 20B, CX 21, CX 21A, CX 21B, CX 24, CX 25 ["instant in-home service"])

II. CONCLUSIONS

A. *Summary of the Proceedings*

Respondents Rentacolor, Inc., Rentacolor U.S.A., Inc., and Brian N. Cawley, individually and as an officer of the respondent corporations, are engaged in the business of leasing television sets and other video equipment to the public. These [24] lease transactions constitute consumer leases of personal property for personal, family, or household purposes, as "consumer lease" is defined in Section 226.2(mm) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System, and respondents have so stipulated. (Stip. 4, 5, 9; CXs 6-10; F. 22)

Respondents are charged in the complaint with causing customers to execute consumer lease agreements that:

1. Failed to make all of the required disclosures together, as required by Section 226.15(a) [213.4(a)(2)] of Regulation Z[M], on either:

(a) the contract or other instrument evidencing the lease on the same page and above the place for the lessee's signature; or

(b) a separate statement which identifies the lease transaction;

2. Failed to disclose the total amount of the periodic payments scheduled under the lease, as required by Section 226.15(b)(3) [213.4(g)(3)] of Regulation Z[M]; and

3. Failed to disclose whether or not the lessee has the option to purchase the leased property, as required by Section 226.15(b)(11) [213.4(g)(11)] of Regulation Z[M].

(Complaint ¶ 5)

The complaint further charges that respondents have caused to be published advertisements, as "advertisement" is defined in [25] Section 226.2(d) [213.2(a)(2)] of Regulation Z[M], to aid, promote, or assist directly or indirectly their consumer leases. Certain of these advertisements have stated the amount of the periodic payment involved or that no downpayment is required, without also stating each of the following:

1. That the transaction advertised is a lease, as required by Section 226.10(g)(1) [213.5(c)(1)] of Regulation Z[M];
2. The total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required, as prescribed by Section 226.10(g)(2) [213.5(c)(2)] of Regulation Z[M];
3. The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease, as required by Section 226.10(g)(3) [213.5(c)(3)] of Regulation Z[M]; and
4. A statement of whether or not the lessee has the option to purchase the leased property and at what price and time, as required by Section 226.10(g)(4) [213.5(c)(4)] of Regulation Z[M].

(Complaint ¶ 4)

Pursuant to Section 103(s) of the Truth in Lending Act, respondents' alleged failures to comply with Sections 226.10(g) [213.5(c)] and 226.15 [213.4] of Regulation Z[M] are charged as violations of that Act and, pursuant to Section 108 thereof, violations of the Federal Trade Commission Act. [26]

The record in this proceeding consists of a stipulation of facts together with documentary exhibits which have been incorporated into the stipulation. The parties waived the right to a formal hearing and to the introduction of any documents not cited in the stipulation, and rely upon the stipulation and the documents incorporated therein, together with their findings of fact and supporting legal briefs. (Stip., Introductory ¶) Respondents have stipulated that Rentacolor, Inc. and Rentacolor U.S.A., Inc. have used the same lease contracts and the same advertisements in the operation and promotion of their business. (Stip. 29, 30) Rentacolor charges an installation fee when the leased property is installed in the customer's home. The fee varies depending on the type of unit leased. (Stip. 7)

The Consumer Leasing Act (Section 183 of the Truth in Lending Act and Section 226.10(g) of Regulation Z, which implements the Truth in Lending Act) provides that any consumer lease advertisement that states the amount or number of any payments, or that any or no downpayment is required, must also disclose certain additional information. The information required to be disclosed is (1) that the advertised transaction is a lease; (2) the total amount of any payment required at consummation of the lease or that no such payment is required; (3) the number, amounts, due dates or periods of scheduled [27] payments and the total of such payments; (4) a statement of whether or not the lessee has the option to purchase the property and at what price and time; and (5) a statement of the amount or method of determining the amount of any end of term liabilities imposed upon the lessee.

The Consumer Leasing Act also requires that written disclosures of costs and terms be made prior to consummation of any lease contract. Section 182 of the Truth in Lending Act and Section 226.15(b) [Section 213.4(g)] of Regulation Z[M] spell out the necessary disclosures, which include such items as a description of the leased property, the total amount of any incidential fees payable by the lessee during the lease term, the number and amount of periodic payments and the total of such payments, and the amounts and methods of determining the amounts of any end of term liabilities. Included also are descriptions and costs of any insurance involved in the lease, identification of express warranties, responsibility for maintenance, and any security interest retained by the lessor. Section 226.15(a) [Section 213.4(2)] of Regulation Z[M] requires that these lease disclosures be made *together* on either the lease contract and *above the place for the lessee's signature*, or on a separate statement that identifies the lease transaction. [28]

Subsequent to March 23, 1977, to and including July 1980, respondents, in connection with their consumer leases, have caused their customers to execute consumer lease contracts. Respondents did not provide their customers with any other consumer lease disclosures during this period. (Stip. 22, 24) On the front page of the consumer lease contracts (CXs 5–10), respondents disclose:

(1) a brief description of the leased property, as required by Section 226.15(b)(1) of Regulation Z;

(2) the total amount of the initial payment due at consummation of the lease, as required by Section 226.15(b)(2) of Regulation Z; and

(3) the number and amount of the monthly payments scheduled under the lease, as required by Section 226.15(b)(3) of Regulation Z.

The place for the lessee's signature is located at the bottom of the front page of the contract. (*See, e.g.*, CX 6A)

The information disclosed on the face of the contracts, as aforesaid, is not disclosed on the back of the contracts. On the back of the contracts, respondents disclose:

(1) a description of their responsibility for servicing and maintaining the leased property, as required by Section 226.15(b)(8) of Regulation Z;

(2) the amounts of the charges for delinquency, default, or late

payment, as required by [29] Section 226.15(b)(10) of Regulation Z; and

(3) the conditions under which respondents may terminate the lease prior to the end of the scheduled term, as required by Section 226.15(b)(12) of Regulation Z.

The above information disclosed on the back of the contracts is not disclosed on the face of the contracts.

Thus, by the use of the aforementioned lease contracts, respondents have:

(1) failed to make all of the required disclosures together, as required by Section 226.15(a) of Regulation Z, on either:

(a) the contract or other instrument evidencing the lease on the same page and above the place for the lessee's signature; or

(b) a separate statement which identifies the lease transaction;

(2) failed to disclose the total amount of the monthly payments scheduled under the lease, as required by Section 226.15(b)(3) of Regulation Z; and

(3) failed to disclose whether or not the lessee has the option to purchase the leased property, as required by Section 226.15(b)(11) of Regulation Z.

Subsequent to March 23, 1977, respondents have caused advertisements to be published, as "advertisement" is defined in [30] Section 226.2(d) [Section 213.5(c)] of Regulation Z[M]. (F. 42) Advertisements were published in Massachusetts (CX 21B), where only Rentacolor, Inc. does business (Stip. 1, 2), in Michigan (CX 20B) and in the Washington, D.C. metropolitan area (CXs 11–13, CXs 16–17, CXs 20–21, CX 21A, and CX 24) where only Rentacolor U.S.A., Inc. does business (Stip. 1, 2), and in Connecticut and Pennsylvania, where both Rentacolor, Inc. and Rentacolor U.S.A., Inc. do business. (Stip. 1, 2; CX 20A, CX 25)

Some of these advertisements stated the amount of the required monthly payment (CXs 11–12, CXs 16–17), and some advertisements stated that no downpayment was required (CXs 11–13, CX 16, CX 20, CX 20A, CX 20B, CX 21, CX 21A, CX 21B, CXs 24–25), thus triggering the disclosure requirements of Section 226.10 of Regulation Z (Section 213.5(c) of Regulation M).

By and through these advertisements, respondents have:

(1) failed to disclose that the advertised transaction is a lease, as required by Section 226.10(g)(1) of Regulation Z (*see* CXs 11–13);

(2) failed to disclose the total amount of the payment due at consum-

mation of the lease or that no such payments were required, as prescribed by Section 226.10(g)(2) of Regulation Z (*see* CX 17);

(3) failed to disclose the amount of the installation charge as part of the [31] payment due at consummation of the lease, as required by Section 226.10(g)(2) of Regulation Z (*see* CXs 11–13, CXs 16–17, CX 20, CX 20A, CX 20B, CX 21A, CX 21B, CXs 24–25);

(4) failed to disclose the number of monthly payments due under the lease, as required by Section 226.10(g)(3) of Regulation Z (*see* CXs 11–13 and CX 17);

(5) failed to disclose the amount of the monthly payments due under the lease, as required by Section 226.10(g)(3) of Regulation Z (*see* CX 20, CX 20A, CX 20B, CX 21A, CX 21B, CXs 24–25);

(6) failed to disclose the total amount of the monthly payments due under the lease, as required by Section 226.10(g)(3) of Regulation Z (*see* CXs 11–13); and

(7) failed to disclose whether or not the lessee has the option to purchase the leased property, as required by Section 226.10(g)(4) of Regulation Z (*see* CXs 11–13).

The Federal Trade Commission staff first contacted respondents on December 11, 1979, following publication of a Rentacolor advertisement in *The Washington Post TV* magazine for the week of December 2, 1979. (Stip. 8, 12; CX 11) Respondents responded to the staff letter with a letter dated February 13, 1980, enclosing some advertisements and lease contracts, together with a written statement about respondents' leasing activities. (Stip. 9) The staff subsequently contacted respondents by letter dated March 6, 1980, requesting additional information, and respondents responded by letter dated March 21, [32] 1980. (Stip. 10, 11) By letter dated March 27, 1980, respondents sent the staff drafts of four new Rentacolor advertisements, CX 14B–E. (Stip. 15) On April 11, 1980, the staff met with respondent Brian N. Cawley and respondents' counsel to discuss respondents' lease contract forms and their advertisements, and their plans for revising them. (Stip. 16) By letter dated April 23, 1981, Rentacolor's counsel sent the staff four more Rentacolor ads for its perusal, CX 15B–E. (Stip. 17)

The staff next contacted respondents by letter of September 9, 1981. This letter was sent to respondents subsequent to publication of an advertisement in *The Washington Post TV* magazine for the week of September 6, 1981, identified as CX 17. (Stip. 19, 20) CX 17 does not disclose the total amount of any payment due at consummation of the transaction, or that no such payment is required. Respondents' counsel responded to the staff's letter with a letter dated September 14 1981, enclosing advertisements identified as CXs 19–23. (Stip. 21)

The staff again met with Rentacolor's counsel and Respondent Brian N. Cawley on December 16, 1981. (Stip. 31) This followed publication of an ad in the *TV Guide* magazine for the Washington, D.C. metropolitan area for the week of October 10–16, 1981 (Stip. 27; CX 24), which did not disclose the amount of [33] the monthly payments scheduled under the lease, and did not disclose that a charge is imposed at the beginning of the lease for installation or that no such charge is due.

The advertisement identified as CX 25 was published in *The Philadelphia Inquirer TV Week* for the week of March 14, 1982. (Stip. 28) This advertisement, identical in substance to CX 24, did not disclose the amount of the monthly payments scheduled under the lease, and did not disclose that a charge is imposed at the beginning of the lease for installation or that no such charge is due.

The Commission's complaint issued on November 1, 1982.

B. *Jurisdiction*

Section 108(c) (15 U.S.C. 1607(c)) of the Truth in Lending Act (15 U.S.C. 1601–1667) provides that except to the extent that enforcement of the Act is specifically committed to some other Government agency, the Federal Trade Commission shall enforce its requirements, and a violation of any requirement imposed under the Act shall be deemed to be a violation of the Federal Trade Commission Act. (15 U.S.C. 41–58) Section 108(c) provides further that all of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the Truth in Lending Act, [34] regardless of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.

Section 103(s) (15 U.S.C. 1602(4)) of the Truth in Lending Act[4] provides that any reference to any of the Act's requirements or provisions includes reference to the regulations promulgated under the Act by the Board of Governors of the Federal Reserve System; in this case, Regulation Z.

No statute of limitations attaches to administrative proceedings brought under Section 5 of the Federal Trade Commission Act or by the Commission under the Truth in Lending Act, *Commercial Programming Unlimited, Inc.,* FTC Docket No. 9029 (Jan. 8, 1976) (order denying respondents' motion to dismiss complaint), and neither equitable estoppel nor laches is a defense to an action brought by the government in the public interest. *Horizon Corporation,* 97 F.T.C. 464,

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[4] As a result of the enactment of the Truth in Lending Simplication and Reform Act, which took effect on April 1, 1982, Section 103(s) became Section 103(x), but there was no substantive change in the provision. (*See,* n. 1, *supra,* at 2)

772, 860 (1981); *SKF Industries, Inc.*, 94 F.T.C. 6, 83 n. 8 (1979); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408–09 (1917); *Times-Picayune Publishing Co. v. United States*, 345 [35] U.S. 594, 623–24 (1953); *United States v. Firestone Tire & Rubber Co.*, 374 F.Supp. 431, 433 (N.D. Ohio 1974).

C. *Respondents' Violations of the Consumer Leasing Act*

The Consumer Leasing Act (Pub. L. No. 94–240, 90 Stat. 257, 15 U.S.C. 1667) was enacted on March 23, 1976 as an amendment to the Truth in Lending Act. The Act took effect on March 23, 1977.

Congress had found that there was a growing trend toward leasing durable goods for personal use as an alternative to buying on credit and that these leases had been offered without adequate cost disclosures. It is the purpose of the Act "to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements." (90 Stat. 257; 15 U.S.C. 1601(b))

Leases often provide for monthly payments less than would be available if similar property were purchased on credit. Additionally, many leases require no downpayment or similar [36] charge. This raises the possibility that lease advertisements might mislead consumers by selectively emphasizing one or more of these features. S. Rep. No. 590, 94th Cong., 2d Sess. 5 (1976) To prevent this from happening, Congress has provided in the Consumer Leasing Act that the required disclosures in consumer leases must be set out "accurately and in a clear and conspicuous manner." (15 U.S.C. 1667(a)) The disclosures in advertisements promoting consumer leases must be stated "clearly and conspicuously." (15 U.S.C. 1667(c)) Regulation M, issued by the Board of Governors of the Federal Reserve System to implement the Act, requires that the consumer lease disclosures be made "clearly, conspicuously, in meaningful sequence . . ." and "together on (i) either the contract or other instrument evidencing the lease on the same page and above the place for the lessee's signature; or (ii) a separate statement which identifies the lease transaction." (Section 213.4(a)(1)(2)) Regulation M requires that the disclosures in consumer lease advertisements be made "clearly and conspicuously." (Section 213.5(c))

In *Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246 (3rd Cir. 1980), the court analyzed the consumer lease disclosure requirements of the Truth in Lending Act as applied to a car leasing agreement. The court found that numerous provisions in the agreement did not comply with the requirement of Section 226.6(a) of Regulation Z that the mandated disclosures be made [37] in a "clear and conspicuous manner." *Id.*, at 249. In reversing the decision of the district court, the Court of Appeals observed that the lower court had "ignored" the requirement of Section 226.15(a)(1) of Regulation Z that all of the required disclosures be made on the same page and above the place for the lessee's signature. *Ibid.* The court said that the district court was mistaken in assuming that the "clear and conspicuous" requirement was satisfied where the information had to be gleaned by reference to more than one paragraph of the agreement, and more than one page. The court specifically cited the failure of the agreement to state "clearly or explicitly" whether or not the lessee had the option to purchase the leased property, as required by Section 226.15(b)(11) of Regulation Z, and said, in effect, that when the consumer must look at more than one paragraph of the agreement, scattered over two pages, to understand an item of information required to be disclosed by the Regulation, he is not informed in a "clear and conspicuous manner." *Ibid.*

The Rentacolor lease contract (CX 5), in use until August 1980, like the lease agreement in *Thomka*, failed to make all of the required disclosures on the same page, above the place for the lessee's signature, as required by Section 226.15(a)(1) of Regulation Z. Whether or not the lessee has the option to purchase the leased property cannot be gleaned from the [38] disclosures found in Rentacolor's contracts prior to August 1980, or from its advertisements. (CXs 5–10, CXs 11–13) The Rentacolor lease contracts and certain Rentacolor advertisements (CXs 11–13) failed to disclose the total amount of the monthly payments scheduled under the lease, as required by Section 226.15(b)(3) and Section 226.10(g)(3), respectively, of Regulation Z. Rentacolor advertisements also failed to disclose that an installation charge was due at the commencement of the lease contract, and the amount of such charge. (CXs 11–13, CX 17, CX 21, CX 21A, CX 21B, CXs 24–25)

Furthermore, certain Rentacolor advertisements (CX 20, CX 20A, CX 20B, CX 21A, CX 21B, CXs 24–25) failed to disclose the amount of the monthly payments scheduled under the lease, as required by Section 226.10(g)(3) of Regulation Z. Even though the monthly payment might have been determinable in some cases by dividing the yearly amount by the number of months in a year, the lease contracts and advertisements still fail the "clear and conspicuous" test because the law requires the disclosure of an amount, *i.e.*, a dollar figure. As the court said in *Thomka*, "The 'total amount paid' means [the consumer] does not have to do the addition, but that the total amount is noted in one lump figure." 619 F.2d at 249.

The record is clear, respondents' advertisements and lease contracts, alone and in combination, failed to provide in a [39] clear and conspicuous manner, much of the information mandated by the Consumer Leasing Act and Regulation Z. The requirements of the Act and the implementing Regulation Z are unequivocal about the disclosures to be made and how they are to be made. These mandated requirements, although technical in nature, cannot be ignored, and there is no reasonable discretion to deviate from them.

The applicable standard for determining compliance with the Truth in Lending Act is "strict compliance" with the Act's requirements. In *Smith v. Chapman*, 614 F.2d 968 (5th Cir. 1980), a case involving the credit provisions of the Truth in Lending Act, the court, in responding to the defendant's claim of "substantial compliance," explained: "Only adherence to a strict compliance standard will promote the standardization of terms which will permit consumers readily to make meaningful comparisons of available credit alternatives." *Id.* at 971. *See also, Beauty-Style Modernizers, Inc.*, 83 F.T.C. 1761, 1779 (1974) ("There is no such thing as 'substantial' compliance with the Truth in Lending Act and the regulation that implements it. Either you are or you aren't."), and *Certified Building Products, Inc.*, 83 F.T.C. 1004, 1041 (1973).

Further, a "strict compliance" standard means there is no need to find deception or consumer injury in order to establish [40] liability for a violation, *Chapman*, 614 F.2d at 971, and it is not a defense in such a proceeding to show that the public has not been injured by the challenged practice. *American Aluminum Corp.*, 84 F.T.C. 21, 51 (1974). Thus, in *Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538 (3rd Cir. 1979), the Third Circuit rejected the argument that the Act is not violated if there is no allegation that consumers have been deceived or suffered financial loss because of inaccurate Truth in Lending disclosures. The court said, "It is clear, however, that such injury need not be alleged. One of the legislative purposes of the Act is to enable consumers to compare various available credit terms. Any proven violation of the disclosure requirements of the Act is presumed to injure a borrower by frustrating that purpose." *Id.* at 539 (footnote omitted).

Following the example of the credit provisions of the Truth in Lending Act, Congress enacted the Consumer Leasing Act expressly "to protect consumers against inadequate and misleading leasing information." 90 Stat. 257. In considering the appropriate legislation to achieve this purpose, it was stated that important aspects of lease contracts were often not explained clearly; consequently, consumers were unable to compare the advantages or disadvantages of one lease arrangement with another or to compare a lease arrangement to a retail [41] credit sale. *Hearings on H.R. 4657 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing,* 94th Cong., 1st Sess. 1 (1975) (statement of Chairman Frank Annunzio). Congress, in passing the Consumer Leasing Act, predetermined that certain lease terms and information were so invaluable to consumers' ability to make an informed decision regarding leasing that their omission was inherently injurious. Thus, arguments addressed to the "technical" or *"de minimus"* nature of the violation are to no avail in this proceeding. As the court stated in *Gennuso v. Commercial Bank & Trust Co.,* 566 F.2d 437, 443: "Any misgivings about the technical nature of the requirements under the [Truth in Lending] Act or Regulation [Z] should be addressed to Congress and the Federal Reserve Board, not to this Court."

D. *Respondents' Defense Arguments*

Respondents contend that the Consumer Leasing Act (*i.e.,* the consumer leasing provisions of the Truth in Lending Act) did not apply to their business prior to August 1980 because respondents "did not offer a lease for a period of time exceeding four months." (RPF p. 16; RB, pp. 3–5) Respondents base their argument on the fact that the lease contract form [42] used prior to August 1980 (CX 5) does not expressly state that the lessee *must* keep the equipment for twelve months, or for any specific period of time.[5]

Respondents point out that the face of the contracts in evidence (*see, e.g.,* CX 6A), identifies no minimum required rental period. The reverse side of the contracts, however, does contain a provision (Number 10) which provides: "Renter may terminate this agreement after twelve months of signing this Agreement by giving not less than four weeks' written notice of such intention to terminate. . . ."

Respondents contend that this provision should be read to establish only a procedure for cancelling after twelve months (*i.e.,* with four weeks notice); it does not say one must keep the television for twelve months. By inference, a customer had the right under this contract to return the equipment at any time and pay amounts owed for the period the equipment was held. Respondents state that this was the interpretation that Rentacolor placed on its contracts; that it accepted televisions returned to it; and that it instituted no legal action for rental payments for any minimum period. (*See* CX 4) Consequently, according to respondents, the language of the [43] contracts, the practice of respondents, and the use of the contracts by respondents all clearly prove that there was no requirement that a customer keep the equipment rented for any specific period. (RPF, pp. 16–18; RB, pp. 3–5)

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[5] Section 226.2(mm) of Regulation Z defines a "consumer lease" as "a *contract* in the form of a bailment or lease for the use of personal property by a natural person primarily for personal, family or household purposes, *for a period of time exceeding four months. . . .*" (emphasis added)

Respondents' contention with respect to how the lease contracts were interpreted internally in their business operations is self-serving, and the argument which they make in respect to the lease contracts is contrary to the stipulations entered into in this proceeding. Respondents have stipulated that the lease contracts which they transacted in January and February 1980 (*see* CXs 6–10) are "consumer lease contracts" (Stip. 9), as defined by the implementing regulation of the Consumer Leasing Act. (Stip. n. 1, p. 1; *see* F. 22) Respondents have also stipulated that the majority of the lease contracts they have transacted from September 1979 to August 1980 and from August 1981 to the present were for a "minimum *contractual* period of twelve months." (Stip. 5; emphasis added)

A stipulation made in court or preparatory to trial, by a party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. [44] IX Wigmore on *Evidence*, Section 2588 at 586 (3d. ed. 1940). The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, *i.e.*, the prohibition of any further dispute of the fact by such party, and of any use of evidence to disprove or contradict it. *Id.*, Section 2590 at 587; *see also, Hill v. FTC*, 124 F.2d 104, 106 (5th Cir. 1941).

In the absence of fraud, inadvertence, or mistake, parties to stipulations and agreements entered into in the course of judicial proceedings are estopped to take positions inconsistent therewith. 31 C.J.S. Estoppel Section 120; *Markow v. Alcock*, 356 F.2d 194, 198 (5th Cir. 1966). *See also, Turner v. Woodard*, 259 Fed. 737 (1st Cir. 1919); *Schwartz v. Pattiz*, 41 F.R.D. 456 (E.D. Mo. 1967), *aff'd, Pattiz v. Schwartz*, 386 F.2d 300 (8th Cir. 1968).

While there is strong authority supporting the conclusiveness of a judicial stipulation voluntarily entered into, and despite the fact that respondents' argument is inconsistent with the actual language of the stipulations and what is the obvious intent of the stipulations, respondents' argument will be considered since it is grounded on respondents' interpretation of the language, Item 10, of lease contracts which are part of the stipulations. [45]

Even if respondents had not stipulated that the majority of their contracts were for a minimum contractual period of twelve months, the weight of the evidence would nevertheless compel the conclusion that respondents' leases obligated the lessee to lease the equipment for a minimum twelve-month period. The lease contract used prior to

August 1980 expressly provided the lessee a right to terminate the agreement twelve months after signing it. (Item 10 of CX 5B) There is no provision in the lease that states or even suggests that the lessee has a right to terminate the lease at will or at any time prior to the expiration of twelve months. In fact, under the contracts lessees could be liable for $25 as liquidated damages in the event of a breach of the contract. (*See e.g.*, Item 12, CX 6)

Under the doctrine of *expresso unius est exclusio alterius* ("the expression of one thing is the exclusion of another"), when certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. *Little v. Town of Conway,* 171 S.C. 27, 31, 171 S.E. 447, 448 (1933). Applying the doctrine to the instant case, the compelling inference is that by stating the manner in which the lessee could terminate the lease at the end of the twelve-month period, and no other, respondents intended that the lessee would not be entitled to terminate at any time prior to the end of the twelve-month term. If the lessee had a right to [46] terminate the contract in less than twelve months, it would make no sense for respondents *not* to specify the method by which this could be done when they have specified the method for termination at the end of twelve months. Therefore, the clear import of the contract language is that respondents' lease contracts were terminable only upon the completion of the twelve-month term; thus, they were for a fixed and binding duration and may not be considered terminable at will. *See, Besco, Inc. v. Alpha Portland Cement Co.*, 619 F.2d 447, 448 (5th Cir. 1980) (contract not terminable at will because document established duration by defining those events which would permit termination); *Consolidated Laboratories, Inc. v. Shandon Scientific Co.*, 413 F.2d 208, 210 (7th Cir. 1969) (contract terminable upon occurrence of an event is not terminable at will).

Assuming *arguendo* that respondents did take back leased equipment prior to the end of the twelve-month period and did not institute suit to collect unpaid rental installments, this in no way expands upon the language of the lease contract for the benefit of all customers, or enlightens those customers who may have desired to but did not attempt to return the equipment prior to the expiration of the twelve-month period because of the contract language.

Finally, respondents cite three cases to support their argument that the Consumer Leasing Act does not apply "where [47] there is no requirement that a party rent the personal property for more than four months . . .", *Lemay v. Stroman's, Inc.*, 510 F.Supp. 921 (E.D. Ark. 1981); *Dodson v. Remco Enterprises, Inc.*, 504 F.Supp. 540 (E.D. Va. 1980); *Smith v. ABC Rental Systems of New Orleans*, 491 F.Supp. 127 (E.D. La. 1978). (RPF p. 16) These cases, which concern the applicability of the Truth in Lending Act to "rent-to-buy" agreements, involve contracts that *expressly* provided for a rental period of less than four months,[6] and therefore are clearly distinguishable from the facts in this proceeding.

E. *The Remedy*

Having determined that respondents have violated the Consumer Leasing Act and Regulation Z [M], it is necessary to consider an appropriate remedy. It is well established that "the Commission has wide discretion in its choice of a remedy [48] deemed adequate to cope with unlawful practices" and that, so long as the remedy selected has a "reasonable relation to the unlawful practices found to exist," the court will not interfere. *Jacob Seigel Co. v. FTC,* 327 U.S. 608, 611 (1946); *see also, FTC v. Cement Institute,* 333 U.S. 683, 726 (1948); *FTC v. Colgate Palmolive Co.,* 380 U.S. 374, 392 (1965); *L.G. Balfour Co. v. FTC,* 442 F.2d 1 (7th Cir. 1971). Having established a violation, the Commission must "be allowed effectively to close all roads to the prohibited goal, so that the order may not be by-passed with impunity." *FTC v. Rubberoid Co.,* 343 U.S. 470, 473 (1952); *see also, FTC v. National Lead Co.,* 352 U.S. 419, 431 (1957).

Respondents contend that no order should issue because respondents have worked hard to bring their practices in line with the staff's view, and that respondents have been in substantial compliance with the law since July 1980, except for technical defects. (RPF, pp. 18–19; RB, pp. 6–10) Respondents argue that the previous acts are unlikely to be repeated in the future, making entry of a cease and desist order unnecessary. (RPF, p. 20) Respondents further state that the unlawful practices have been voluntarily discontinued or abandoned, that a substantial period of time has elapsed since the acts were last committed, that circumstances indicate respondents were acting in good faith in discontinuing the unlawful practices [49] with no intention of resuming the practices, and that there is no direct proof of a likelihood of resumption of such practices. (RPF, pp. 20–21) According to respondents, the picture that develops from this record is that of companies intent on compliance with the law. (RPF, p. 22) Finally, if an order is deemed necessary, only a declaratory order should enter, with the Commission taking this opportunity to indicate its intention to enforce the law against companies that do not voluntarily comply with the law and which do not show an intention of complying with the law in the future. (RPF, p. 23)

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[6] In *Lemay v. Stroman's, Inc.,* 510 F.Supp. 921 (E.D. Ark. 1981), the agreement contained a clearly stated provision binding the customer to a rental of only one week. In *Dodson v. Remco Enterprises, Inc.,* 504 F.Supp. 540 (E.D. Va. 1980), the contract stated that "the initial rental period shall be one month." *Id.* at 541. "Renter may terminate this agreement at the end of any rental period by return of the property to owner." *Id.* at 542. The contract in *Smith v. ABC Rental Systems of New Orleans, Inc.,* 491 F.Supp. 127 (E.D. La. 1978) stated explicitly that it was a week-to-week rental agreement only, which was "terminable by either party at any time." *Id.* at 128.

Respondents also contend that no order should be entered against respondent Brian N. Cawley, individually. (RPF, pp. 24–26; RB, pp. 10–13) According to respondents, the Board of Directors of Rentacolor formulates and directs policy which respondent Cawley merely implements. (RPF, p. 26) Any order entered against the corporate respondents would automatically bind the offcers responsible for the conduct of corporate affairs. Respondents contend the record establishes no basis for an order against respondent Cawley, individually, and unless the record affirmatively shows some reason for issuing an order against individuals in their individual capacity, no such order should be entered.

The record in this proceeding is not as supportive of respondents' arguments as they would have it. First, [50] respondents' violations of the Consumer Leasing Act cannot be passed off as mere technicalities. Congress was concerned that consumers were being misled as to the true costs of leasing by lessors' failure to disclose important information about lease terms and costs. The Consumer Leasing Act was adopted "to provide consumers with meaningful information about the component and aggregate costs of consumer leases, so that they can make better informed choices between leases and between leases and credit sales." S. Rep. No. 590, 94th Cong., 2d Sess. 2 (1976).

The disclosure violations committed by respondents go to the heart of the purpose of the Consumer Leasing Act; *e.g.*, respondents' failure to disclose in their advertisements the amount of the installation charge, as required by Section 226.10(g)(2) of Regulation Z, deprived consumers of valuable information in determining the initial payment necessary to enter into such an agreement and whether it was to their advantage to do so. The failure to disclose in advertisements the number of payments scheduled under the transaction and the total amount of such payments, as required by Regulation Z, might mislead consumers as to the advantage or disadvantage of leasing. Similarly, respondents' failure to provide all of the required disclosures on the same page above the place for the [51] lessee's signature, as required by Section 226.15(a) of Regulation Z, may have confused consumers or led them to overlook important information concerning their rights under the contract (such as when they had the right to terminate the lease).

These violations cannot be lightly dismissed as "technical." The law recognizes no distinction between technical and substantive violations of the Act and Regulation Z. *Certified Building Products, Inc.*, 83 F.T.C. 1004, 1041 (1973). In fact, such violations have been considered to present "a flagrant failure to provide in a clear and conspicuous manner much of the information mandated by the Act and Regulation Z." *Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 250 (3rd Cir. 1980).

Second, respondents' assertion that discontinuance of the challenged practices was voluntary and unlikely to be resumed is not convincing. Respondents had ample opportunity to acquaint themselves with the Consumers Leasing Act prior to any Commission intervention. The law had been enacted (March 23, 1976) more than three years before the alleged violations were first noted. It was in effect (March 23, 1977) for over two years prior to December 1979, as was Regulation Z, implementing the Act. The Board of Governors of the Federal Reserve System [52] routinely issued staff opinion letters and other documents explaining its requirements, as did the Federal Trade Commission.

The staff first contacted respondents by letter dated December 11, 1979. Respondents replied two months later, by letter dated February 13, 1979. The staff contacted respondents again by letter dated March 6, 1980, and respondents responded by letter dated March 21, 1980. On April 11, 1980, the staff met with respondents' counsel and respondent Cawley. Thereafter, respondents sent the staff a letter dated April 23, 1980.

Respondents did not conform lease contract disclosures with the requirements of the Consumer Leasing Act until August 1980, over seven months after the initial contact by the staff.

During the period December 1979 after the staff had contacted respondents, until the meeting with the staff on April 11, 1980, advertisements were disseminated which did not conform to the requirements of the Act. (CXs 12–13; *see* F. 34, 35) After the meeting with the staff on April 11, 1980, advertisements were disseminated during the week of May 11, 1980, that failed to make all required disclosures. (CX 15E, CX 16; *see* F. 38) During the week of September 6, 1981, CX 17, a non-complying advertisement was disseminated. (F. 39) The [53] staff then contacted respondents by letter dated September 9, 1981. (Stip. 20) Respondents responded to staff's letter with a letter dated September 14, 1981. (Stip. 21) Nevertheless, during September and October 1981, non-complying advertisements were disseminated. (F. 40, 41)

The staff again met with respondents' counsel and respondent Brian N. Cawley, on December 16, 1981. Thereafter, during the week of March 14, 1982, a non-complying advertisement was disseminated in *The Philadelphia Inquirer TV Week*. (F. 41)

Respondents explain this latter advertisement (CX 25) as an "inadvertence." (RPF, p. 22, n. 10)[7] In October 1981, respondents' advertising agency was instructed to modify all advertisements which failed to include the monthly lease charge to include the monthly lease charge. The president of the advertising agency would testify that he immediately instructed his staff to make the changes in the advertisements, that changes were made in all advertisements except the advertisement that appeared in *The Philadelphia Inquirer TV Week*, and that the failure to make that change was the result of inadvertence. (Stip. 32) **[54]**

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[7] Assuming *arguendo* that the March 14, 1982 non-complying advertisement was an inadvertence, respondents

(footnote cont'd)

Respondents apparently would shift responsibility for complying with the law to their advertising agency, and explain their agent's failure to comply with instructions as an "inadvertence." This is impermissible. It was respondents' responsibility to assure that their advertisements were in compliance with the Consumer Leasing Act, and to the extent their agent may have committed an inadvertence, respondents are liable for the acts of their agent.

Thus, the record does not support a picture of a company that voluntarily discontinued the challenged practices, or a company that was intent on complying with the law. Rather, the picture presented is one of much foot-dragging by respondents before and after contact by the staff, a marked degree of inattentiveness or indifference with respect to the legal requirements applicable to what is apparently respondents' principal business - leasing. In any event, it is obvious that whatever the steps taken by respondents to effect compliance with the law, they were both dilatory and inadequate.

The Commission should not be required to continue to monitor respondents' leasing practices so as to advise them everytime they violate the law. A cease and desist order will place the burden of complying with the law where it should be - on respondents.

It is settled this discontinuance or abandonment of a practice does not prevent the issuance of a cease and desist order directed to such practice. *Giant Food, Inc.*, 61 F.T.C. **[55]** 326 (1962). This principle is particularly applicable to situations where the discontinuance was not entirely voluntary but occurred only after the Commission had begun an investigation into such practices, where respondent continues in the same line of business, and where there is no guarantee that the practices may not be resumed. *Coro, Inc.*, 63 F.T.C. 1164, 1201 (1963), *modified and aff'd, Coro, Inc. v. FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Fedders Corp.*, 85 F.T.C. 38, 72–73 (1975), *aff'd*, 529 F.2d 1938 (1976), *cert. denied*, 429 U.S. 818 (1976); *Marlene's Inc. v. FTC*, 216 F.2d 556, 559 (7th Cir. 1954); *Galter v. FTC*, 186 F.2d 810, 812–13 (7th Cir. 1951); *Eugene Dietzen Co. v. FTC*, 142 F.2d 321, 330 (7th Cir. 1944), *cert. denied*, 323 U.S. 730 (1944);

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were still violating the Consumer Leasing Act in October 1981, over twenty-two months after respondents were first contacted by the staff. (*See* CX 24; F. 41)

P.F. Collier & Sons Corp. v. FTC, 427 F.2d 261, 275 (6th Cir. 1970); *Perma-Maid v. FTC*, 121 F.2d 282 (6th Cir. 1941).

In *Zale Corp.*, 78 F.T.C. 1195, 1240 (1971), the Commission stated its position:

> It is well established that the mere fact that the offending practices have been discontinued prior to the issuance of a complaint does not provide, by itself, the requisite assurance that an order is unnecessary and not in the public interest. As the courts have noted, it is the timing and circumstances of the claimed abandonment which is of importance to the issue of the necessity for an order. Where, as here, the abandonment took place only after the Commission's hand was on the respondent's shoulder, the courts are clear that abandonment of the practices under such circumstances will not support a conclusion that the practices will not be resumed. (Footnote omitted) [56]

Accord, J. M. Sanders Jewelry Co., 85 F.T.C. 250, 265 (1975).

F. *Individual Liability of Brian N. Cawley*

The complaint names Brian N. Cawley as respondent in his individual capacity and as officer of the respondent corporations. Cawley is a "person" subject to the requirements of the Truth in Lending Act and Regulation Z because the Act and Regulation apply to any person, as "person" is defined by Section 226.2(bb) of Regulation Z, that offers consumer leases to residents of any state, as "state" is defined in Section 226.2(hh) of Regulation Z. This includes foreign companies or individuals operating in the United States whether or not the lessor is chartered in the United States or a foreign country. Federal Reserve Board Official Staff Commentary on Regulation M, Comment 213.1-1[8]

It is now axiomatic that to prevent erosion of its orders, the Commission has the authority to name individually the officers, directors, and the stockholders of corporations when [57] they have participated in or controlled the acts or practices giving rise to the complaint. *FTC v. Standard Education Society*, 302 U.S. 112 (1937); *Rayex Corp. v. FTC*, 317 F.2d 290 (2d Cir. 1963); *Standard Distributors v. FTC*, 211 F.2d 7 (2d Cir. 1954); *Virginia Mortgage Exchange*, 87 F.T.C. 182, 203 (1976). Cawley, in his capacities as President and Chief Executive Officer and a Director of the corporate respondents (Stip. 3), directly participated in the practices in question. He was present on two occasions at discussions with the FTC staff concerning Rentacolor's lease contracts and advertisements. (Stip. 16, 31) Even if he did not have complete authority over respondents' leasing operations, he certainly was made aware of the requirements of the Consumer Leasing Act, and he was in a position to take whatever steps were necessary to assure that respondents' activities complied with the law. Absent some showing to the contrary, it must be concluded that Cawley was the person primarily responsible for the inadequate manner in which respondents responded to the staff's concerns, and thus for respondents' failure to bring their leasing activities into compliance with the law in a prompt and effective manner.

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[8] While the Official Staff Commentary is meant to interpret the leasing regulations promulgated as Regulation M, effective April 1, 1981, the Commentary makes it clear that there has been no change in regulatory coverage or applicability since the consumer leasing provisions were issued as part of Regulation Z. *See* "References" to Comment 213.1.

Cawley has directed the operations of the corporate respondents for the entire period covering the record violations. (Stip. 3) Previously he had 15 years of experience in the television rental business in England before he assumed [58] his position as president and a member of the Board of Directors of respondent corporations in the United States. (CX 4A) Acting as agent for Rentacolor International, Rentacolor, Inc.'s foreign parent (CX 4A), Cawley could easily dissolve the respondent corporations, form a new corporation under a different name, or go in business for himself. The Commission, with such a possibility in mind, stated in *Coran Bros. Corp.*, 72 F.T.C. 1, 25 (1967):

> The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented. Such a "loophole" is obvious in a case . . . where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization.

Failure to name Cawley individually would result in such a loophole; hence, the public interest requires that the Commission take the precautionary measure of including him in its order. Proof that he intends to evade the order is unnecessary. *Id.*, at 24. "[T]he opportunity to evade is the loophole that must be closed." *Carpets "R" Us, Inc.*, 87 F.T.C. 303, 320 (1976). *See also, Virginia Mortgage Exchange, supra.* [59]

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over respondents and the subject matter of this proceeding.

2. The complaint herein states a cause of action and this proceeding is in the public interest.

3. Subsequent to March 23, 1977, respondents have transacted "consumer leases" as defined in Section 226.2(mm) of Regulation Z, that failed to comply with Section 226.15 of Regulation Z.

4. Subsequent to March 23, 1977, respondents have caused "adver-

tisements" as defined in Section 226.2(d) of Regulation Z to be published that failed to comply with Section 226.10(g) of Regulation Z.

5. Respondents, by violating Sections 226.15 and 226.10(g) of Regulation Z, have violated the Truth in Lending Act by virtue of Section 103(s) of the Act, and, pursuant to Section 108(c) thereof, respondents have thereby violated the Federal Trade Commission Act.

6. The Order entered hereinafter against corporate respondents Rentacolor, Inc. and Rentacolor U.S.A., Inc., and [60] Brian N. Cawley, individually, is appropriate and necessary to remedy the violations of law which have been found to exist.

ORDER

I

It is ordered, That respondent Rentacolor, Inc., a corporation, Rentacolor U.S.A., Inc., a corporation, their successors and assigns, and their officers, and Brian N. Cawley, individually and as an officer of said corporations, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with any consumer lease or arrangement for a consumer lease, or any advertisement to aid, promote, or assist directly or indirectly any consumer lease, as "consumer lease" and "advertisement" are defined in Regulation M (12 C.F.R. 213), do forthwith cease and desist from:

A. Representing in any advertisement, directly or by implication, the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease, unless all of the [61] following items are disclosed as applicable, as required by Section 213.5(c) of Regulation M:

(1) that the transaction advertised is a lease;

(2) the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required;

(3) the number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;

(4) a statement of whether or not the lessee has the option to purchase the leased property and at what price and time; and

(5) a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and a [62] statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property

and its realized value at the end of the lease term, if the lessee has such liability.

B. Failing to make all of the required disclosures prior to consummation of the transaction, as required by Section 213.4(a)(2) of Regulation M, together on either:

(1) the contract or other instrument evidencing the lease on the same page and above the place for the lessee's signature; or

(2) a separate statement which identifies the lease transaction.

C. Failing to disclose the total of the periodic payments scheduled under the lease, as required by Section 213.4(g)(3) of Regulation M.

D. Failing to disclose whether or not the lessee has the option to purchase the leased property, as required by Section 213.4(g)(11) of Regulation M. [63]

E. Failing, in any consumer lease transaction or advertisement, to make all the disclosures required by Sections 213.4 and 213.5 of Regulation M in the manner prescribed by Sections 213.4 and 213.5 of Regulation M.

II

It is further ordered, That the corporate respondents distribute a copy of this Order to all operating divisions of said corporations and to present or future personnel, agents, or representatives of said corporations having sales, advertising, or policy responsibilities with respect to the subject matter of this Order, and that respondents secure from each such person a signed statement acknowledging receipt thereof.

III

It is further ordered, That the corporate respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor [64] corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this Order.

IV

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten (10) years from the date of service of this Order, said respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this Order.

V

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this Order, [65] file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

Opinion of the Commission

By Miller, *Chairman:*

This matter is before the Commission on appeal from an initial decision[1] of Administrative Law Judge Ernest G. Barnes. Judge Barnes sustained the allegations of the Commission's complaint against all three respondents named therein: Rentacolor, Inc., Rentacolor U.S.A., Inc., and Brian N. Cawley, as an officer of said corporations and individually (respondents are hereinafter referred to collectively as "Rentacolor" or "the company"). The evidence before the ALJ was limited to facts stipulated by agreement of the parties and to documents submitted with the stipulation agreement. Judge Barnes found that Rentacolor had violated the Consumer Leasing Act (15 U.S.C. 1667 *et seq.*) ("the CLA"),[2] Regulation Z (12 C.F.R. 226) and [2] Regulation M (12 C.F.R. 213) promulgated thereunder,[3] and the Federal Trade Commission Act (15 U.S.C. 45). In particular, he found that the company had failed to make several disclosures required by the CLA and its implementing regulations and to make certain disclosures in the manner required in connection with Rentacolor's advertising and leasing of color television sets and other video equipment to the public. The order issued by Judge Barnes would require Rentacolor to disclose certain information in accord with the specific requirements of the CLA and Regulation M and would impose the order's requirements upon respondent Cawley as an officer of the respondent corporations and individually.

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[1] The following abbreviations are used herein:

I.D.F. – Initial Decision Finding No.
I.D. – Initial Decision Page No.
RB – Respondent's Appeal Brief Page No.
RRB – Respondent's Reply Brief Page No.
Stip. – Stipulation No.
CX – Exhibit No.

[2] The CLA (Pub. L. 94-240, 15 U.S.C. 1667 *et seq.*) was signed into law as an amendment of the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) on March 23, 1976 and became effective on March 23, 1977.

[3] Prior to April 1, 1981, the CLA was implemented by consumer leasing provisions contained in the Federal Reserve Board of Governors' Regulation Z (12 C.F.R. 226), which implements the Truth in Lending Act. The consumer leasing provisions were removed from Regulation Z by the Board and redesignated as Regulation M (12 C.F.R. 213), effective April 1, 1981, without any substantive changes being made to those provisions. The Commission's complaint allegations covered periods before and after April 1, 1981 and therefore cited to both Regulation Z and Regulation M.

The record on appeal is limited to that which was before the ALJ and to written briefs filed on appeal. Oral argument was waived. Rentacolor makes essentially the same contentions here as it did below: (1) that complaint counsel failed to show by a preponderance of the evidence that Rentacolor was subject to the requirements of the CLA during the period of its alleged violations; (2) that the company's prompt and good-faith compliance with the Act since July 1980 requires that no order be [3] issued; and (3) that, in any event, no order should be issued against Cawley in his individual capacity.

We find Rentacolor's first two contentions to be without merit, as did Judge Barnes, but we believe the evidence insufficient to support an order against Cawley individually. Accordingly, we adopt Judge Barnes's findings, conclusions, and initial decision except as qualified or changed by this opinion and we adopt his order except as to Cawley in his individual capacity.

I. *Alleged Failure of Complaint Counsel To Show that Rentacolor Was Subject To the CLA*

The CLA applies only to consumer leases that bind lessees to keep the leased equipment "for a period of time exceeding four months. . . ." 15 U.S.C. 1667(1). Rentacolor asserts that prior to August 1980, it leased to the public on a month-to-month basis only. However, the facts set forth in Stipulation 5 are contrary to Rentacolor's contention.

Stipulation 5, in relevant part, states:

> From September 1979 to August 1980 and from August 1981 to the present Rentacolor had available and *transacted lease agreements* from three to *twelve months in duration. The majority of these lease agreements were for a minimum contractual period of twelve months* (Emphasis added). [4]

Rentacolor does not challenge the ALJ's reliance upon these facts. We find them sufficient to reject the company's argument and adopt the ALJ's findings on this point.[4]

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[4] Stipulation 9 states, in part, that certain Rentacolor contracts executed during January and February 1980 are "consumer lease contracts." Footnote 1 of the stipulation agreement defines the term "consumer lease" by refer-

(footnote cont'd)

Notwithstanding the facts set out in Stipulation 5, Rentacolor argues that until August 1980, the company leased to the public on a month-to-month basis because its lease form in use until then (CX-5; Stip. 22) contained no provision specifying a minimum term for the lease[5] but did include a provision that [5] expressly required the customer to pay a monthly rental fee (RB 16-17). From this Rentacolor argues that its pre-August 1980 leasing agreements must be construed as imposing only a month-to-month term in accordance with court decisions holding that the term of a lease of real property for an unspecified period may be implied from the intervals at which rent is paid (RB 17-18).

Rentacolor's reliance upon decisions involving real property leases is misplaced. We are dealing here with leases, not of real property, but of personal property, to which the law governing contracts applies. It is hornbook contract law that the intent of the contract must be deduced from the instrument as a whole and from the surrounding circumstances. *Williston On Contracts,* Third Edition, Section 610B (1961). We think it clear from the terms of the Rentacolor lease and from the surrounding circumstances that the company intended that the majority of its leases were to run, not month-to-month, but year-to-year.[6]

The company's advertisements frequently promoted monthly rental rates on a "yearly" or "12-month" basis (CX 2, 11, 12, 13), thus inviting the public to enter into leasing agreements of a year's duration. Rentacolor's leases calculated a customer's payments in terms of the "First Year" through the "Fifth and subsequent yrs" (CX 6a - CX 10a), which clearly suggests, [6] contrary to Rentacolor's contention, that the company intended its leases to run far longer than one

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ence to Section 213.2(a)(6) of Regulation M which, in turn, defines "consumer lease" to mean "a contract . . . for a period of time exceeding four months. . . ." Rentacolor contends that Footnote 1 was not intended by the parties to be used to interpret Stipulation 9 but was merely meant to describe the company's practices that are involved in the Commission's proceeding. Thus, according to Rentacolor, the term "consumer lease contracts" used in Stipulation 9 is not synonomous with Regulation M's definition of "consumer lease" (RB 19, n.3; RRB 2-4). Rentacolor's contention as to the significance of Footnote 1 creates enough doubt as to prompt us not to rely upon Stipulation 9 as a second ground for rejecting the company's argument on the basis of the stipulation agreement. However, as noted above, we find the unchallenged facts of Stipulation 5 to be an adequate basis for rejecting the company's argument.

[5] By contrast, the lease form that Rentacolor began using in August 1980 (CX-22 (a-b); Stip. 23) does contain a provision specifying a minimum term "for a period of 24 months" (CX-22(a), Item 2), with the number of months apparently inserted at the time the lease is executed. Moreover, Rentacolor's Disclosure Statement (CX-23), which the company began using for the first time in July 1980 (Stip. 24), provides that the customer "may not terminate the lease prior to the end of the lease term (CX-23, Item 12(a))." From August 1980 thru July 1981 Rentacolor transacted lease agreements solely for three months in duration (Stip. 5); its leasing activities were therefore not subject to the CLA during that period, and the evidence of record does not concern that period. However, in August 1981 Rentacolor again began transacting lease agreements up to twelve months in duration (Stip. 5), and the company does not contest that it became subject to the Act at that time.

[6] Even if we were dealing here with leases of real property, we would reach the same conclusion. Such leases are regarded as contracts to which contract law generally applies. *Thompson On Real Property,* Section 1046 (1980 Replacement); 51C C.J.S. 232. The interval between payments of rent does not control the duration of the term of the lease where the provisions of the lease or other circumstances indicate otherwise. *Thompson On Real Property, supra,* Section 1088; 51C C.J.S. 232.

month. Precisely how much longer is answered by Item 10 on the back of the Rentacolor contracts (CX 6b–CX 10b):

> Renter may terminate this agreement after twelve months of signing this agreement by giving not less than four weeks written notice of such intention to terminate. . . .

Rentacolor's explanations of the significance of this provision as "simply confirm[ing] that the lease *may* extend more than one year on a month to month basis (RB 19)", or as "simply to protect both the customer and Rentacolor in the event the lease should extend so long (*Id.*)," or as "simply reinforc[ing] respondents' position that no particular method of termination is required when the equipment is held for less than a year (RRB 5)" are strained and unconvincing. We agree with Judge Barnes that since the Rentacolor lease contained no provision expressly allowing the customer to terminate the agreement in less than twelve months, and, in fact, expressly conferred a right of termination only after twelve months, the compelling inference is that the contract was intended to bind the customer to a twelve-month lease (I.D. 44–46).

II. *Alleged Voluntary Discontinuance*

Rentacolor argues that no order should be issued because: 1) the company acted promptly and in good faith to correct alleged violations of the law (RB 24); 2) it "moved decisively" in this direction "in April 1980" (RB 23); 3) it commenced advertising in line with the requirements of the CLA "as early as [7] May 1980" (*Id.*); 4) it was "in full compliance" with staff's view of the Act "by July 1980" (RB 3, 20–21, and 24); 5) any alleged violations which occurred after July 1980 were merely "technical" or "inadvertent" and were "quickly remedied" (RB 4, 12, 20 and 23); 6) all alleged violations "have long since been voluntarily discontinued" (RRB 9); and 7) its corrective actions justify an inference that any previous practices, if found unlawful, are not likely to be repeated in the future (RB 24).

The record does not support any of these claims. We note, first of all, that Rentacolor does not even claim to have complied with the CLA before the Commission began its investigation in December 1979. Indeed, the company argues that its leasing activities were not subject to the Act at that time, and the evidence confirms the company's noncompliance: the only Rentacolor lease form in use at that time (CX–5; Stip. 22) did not comply with the law (I.D.F. 22–28; I.D. 26–29, 37–41); and the company's advertisements published around the time of the commencement of our investigation also failed to comply with the law (I.D.F. 30–32; I.D. 24–25, 29–31, 38).

Even the onset of the Commission's investigation in December 1979 failed to stir Rentacolor into compliance with the CLA with any deliberate speed. The company's "decisive move" of April 1980 entailed a meeting with Commission staff, but nothing more (Stipulation 16). That meeting was preceded and followed by several months' exchange of written correspondence (I.D.F. 5–6, 17) during which Rentacolor made available copies of its leases and advertisements, which reflected the company's continuing [8] failure to comply with the Act both before and after the April meeting (I.D.F. 5–7, 15–18, 31–38; I.D. 29–32, 35–41). Rentacolor does not cite, nor can we discover, any evidence to support its claim that it commenced advertising in line with the requirements of the Act "as early as May 1980." Indeed, the evidence is to the contrary (I.D.F. 18–20, 38–42; I.D. 30–33, 38). Nor was the company "in full compliance" with the CLA "by July 1980," as it claims. What corrective action it finally took at that time—nearly seven months after our investigation began—only partially satisfied the Act's requirements: the company adopted for the first time a disclosure statement for use with its contracts (I.D.F. 13).[7] However, this corrective action did not bring Rentacolor's advertising practices into line with the Act.

Despite the Commission's previous efforts to secure Rentacolor's compliance with the CLA, the company's advertisements in September and October 1981 and one in March 1982, while satisfying more of the Act's requirements than previous ads, nevertheless failed to fully comply with the Act. (Compare I.D.F. 15–18, 30–38 with I.D.F. 19 and 39–41). We reject the company's contention that these deviations were "technical" and ought not be regarded as vitiating its "substantial efforts" to [9] comply (RB 20). As we said in *Beauty Style Modernizers, Inc.*, 83 F.T.C. 1761, 1779 (1974):

> There is no such thing as "substantial" compliance with the Truth in Lending Act and the regulation that implements it. Either you are or you aren't. The purpose of that statute is to permit the ordinary consumer, without regard to the degree of his commercial sophistication, to receive the kind of credit information that will allow him effectively to compare the credit terms being offered in the marketplace and thus to "shop" for the most favorable terms available. (15 U.S.C. 1601.) Only uniform terms, universally used, would allow the kind of credit comparison mandated by the Act.

See also, *James* v. *City Home Service, Inc.*, 712 F.2d 193, 194 (5th Cir. 1983); *Smith* v. *Chapman*, 614 F.2d 968, 971 (5th Cir. 1980); *Certified Building Products, Inc.*, 83 F.T.C. 1004, 1041 (1973).

At least one violation, moreover, continued throughout the Commission's investigation, and on the basis of the record we cannot be certain that it has been discontinued even now, *i.e.*, the failure to disclose the total amount the consumer must pay at the consummation of the lease (I.D.F. 30–36, 38–41; I.D. 29–33, 38–41). Even if it were clear that Rentacolor had discontinued all challenged practices after the Commission had begun its investigation, that would not preclude entry of an order. *Fedders Corp.* v. *FTC*, 529 F.2d 1398 (2d Cir.) *cert. denied*, 429 U.S. 818 (1976); *P.F. Collier & Sons Corp.* v. *FTC*, 427 F.2d 261 (6th Cir. 1970); *Coro, Inc.* v. *FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Galter* v. *FTC*, 186 F.2d 810 (7tn Cir.) *cert. denied*, 342 U.S. 818 (1951). Rentacolor's history of begrudging and inadequate compliance with the CLA only [10] after Commission intervention does not inspire confidence that without an order to cease and desist the company would pursue a future course of full compliance. From the record before us, a cognizable danger of recurrent violation is apparent. *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953).

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[7] Regulation Z (now Regulation M) provided an option for the making of disclosures with respect to a lease agreement covered by the CLA: such disclosures could be made on one page of the agreement above the place for the consumer's signature or on a separate disclosure statement. 12 C.F.R. 226.15(a) (now 12 C.F.R. 213.4(a)(2)). Rentacolor chose the second option.

III. *Individual Liability of Respondent Cawley*

We find the evidence insufficient to support an order against respondent Cawley in his individual capacity. While we agree with Judge Barnes that such an order is justifiable where an executive officer of the respondent company is found to have personally participated in or controlled the challenged acts or practices,[8] we find the evidence insufficient to support such findings. Cawley's participation in two meetings with the Commission staff concerning Rentacolor's leasing agreements and advertising practices does not demonstrate his personal participation in or control of those practices. Similarly, the fact that "[Rentacolor's] Board of Directors formulates policy for Rentacolor and, as president, Cawley is responsible for implementing that policy (Stip. 3)" does not demonstrate the [11] requisite degree of control necessary to establish personal responsibility.

The lack of evidence on two other factors adds weight to our decision: there is no evidence that Cawley has sufficient control over the respondent corporations to defeat an order against them by dissolving the corporations and forming a new one; nor is there any evidence suggesting that Cawley has the financial resources or backing necessary for him to enter the leasing business on his own. In light of all the evidence, we find personal liability inappropriate in this case.

After the record in this case closed, respondent Cawley filed an affidavit stating that he had resigned as President and Director of both Rentacolor companies; he had no present affiliation with, and no present intent of becoming affiliated with, either of the Rentacolor companies; and he had no present intent of reentering the T.V. rental business. In the accompanying order, the Commission granted Cawley's motion to file this affidavit. However, our decision regarding his personal liability is not based on the information included in this affidavit. Indeed, we believe it is entirely appropriate for the Commission to enter an order against an individual respondent even though that individual no longer has any affiliation with the corporate respondent. *Crown Tuft, Inc.*, 93 F.T.C. 1085, 1086 (1977) (order denying motion to modify or vacate consent order); *Raymond Lee Organization*, 92 F.T.C. 489, 637–639 (1978).

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[8] As Judge Barnes found, it is "axiomatic that the Commission has the authority to name individually the officers, directors, and the stockholders of corporations when they have participated in or controlled the acts or practices giving rise to the complaint. *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937); *Rayex Corp.* v. *FTC*, 317 F.2d 290 (2nd Cir. 1963); *Standard Distributors* v. *FTC*, 211 F.2d 7 (2nd Cir. 1954); *Virginia Mortgage Exchange*, 87 F.T.C. 182, 203 (1976)." (I.D. 56–67).

FINAL ORDER

This matter has been heard by the Commission upon respondents' appeal from the initial decision and upon briefs in support thereof and in opposition thereto. Oral argument was waived. The Commission, for the reasons stated in the accompanying Opinion, has granted the appeal in part and denied it in part.

After the record closed, respondent Brian N. Cawley submitted a motion requesting leave to file an affidavit. *It is ordered*, That respondent Cawley's affidavit be placed on the record.

It is further ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission except where inconsistent with the attached Opinion and that the complaint as to respondent Brian N. Cawley be dismissed.

It is further ordered, That the following Order to Cease and Desist be entered: [2]

ORDER

I

It is ordered, That respondents Rentacolor, Inc., a corporation, and Rentacolor U.S.A., Inc., a corporation, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with any consumer lease or arrangement for a consumer lease, or any advertisement to aid, promote, or assist directly or indirectly any consumer lease, as "consumer lease" and "advertisement" are defined in Regulation M (12 C.F.R. 213), do forthwith cease and desist from:

A. Representing in any advertisement, directly or by implication, the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease, unless all of the following items are disclosed as applicable, as required by Section 213.5(c) of Regulation M: [3]

(1) that the transaction advertised is a lease;

(2) the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required;

(3) the number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;

(4) a statement of whether or not the lessee has the option to purchase the leased property and at what price and time; and

(5) a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

B. Failing to make all of the required disclosures prior to consummation of the transaction, as [4] required by Section 213.4(a)(2) of Regulation M, together on either:

(1) the contract or other instrument evidencing the lease on the same page and above the place for the lessee's signature; or

(2) a separate statement which identifies the lease transaction.

C. Failing to disclose the total of the periodic payments scheduled under the lease, as required by Section 213.4(g)(3) of Regulation M.

D. Failing to disclose whether or not the lessee has the option to purchase the leased property, as required by Section 213.4(g)(11) of Regulation M.

E. Failing, in any consumer lease transaction or advertisement, to make all the disclosures required by Sections 213.4 and 213.5 of Regulation M in the manner prescribed by Sections 213.4 and 213.5 of Regulation M. [5]

II

It is further ordered, That the respondents distribute a copy of this Order to all operating divisions of said corporations and to present or future personnel, agents, or representatives of said corporations having sales, advertising, or policy responsibilities with respect to the subject matter of this Order, and that respondents secure from each such person a signed statement acknowledging receipt thereof.

III

It is further ordered, That the respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this Order.

IV

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this Order, file with [6] the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

IN THE MATTER OF

G.R.I. CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8828. Consent Order, Feb. 11, 1972—Modifying Order, April 20, 1984

This order reopens the proceeding and modifies a consent order entered on Feb. 11, 1972 (80 F.T.C. 155), which required a direct mail marketing firm, among other things, to cease disseminating advertisements and promotional materials which falsely guarantee or misrepresent the quality or price of any drug, food or beauty preparation. The order further required respondent to clearly and conspicuously disclose, in close proximity to any offer used to enroll consumers in a plan in which other items would be shipped regularly at additional charges, the full details and conditions of that plan, and to repeat them each time the offer was mentioned in the ad. Under the modifying order, the company must clearly and conspicuously disclose near any "free" or special offers that acceptance of the offer places further obligations on the consumer. Except where a coupon or similar form of acceptance is included, respondent need only disclose details of such obligations once elsewhere in the ad.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On December 23, 1983, G.R.I. Corporation, [hereinafter G.R.I. or respondent] respondent in the above-captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the order entered therein.

The order, which was entered in 1972, covers the offering for sale, sale, or distribution of "Bio-Rich Beauty Cream," "Over Fifty Capsulets," and "Beauty Kits," or any food, drug, or cosmetic.

The order, among other things, prohibits the respondent from falsely guaranteeing its products, misrepresenting the quality of its products in any way, misrepresenting various quality aspects of its products, misrepresenting various aspects of its prices, or attempting to collect for merchandise which has been refused or returned. Paragraph 1(a) of the order prohibits respondent from representing that "[a]ny product is offered free or under any other terms where the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless all of the conditions of the plan are disclosed clearly and conspicuously and within close proximity to the 'free' or other offer."

G.R.I. now seeks to modify the order, by adding a provision to paragraph 1(a) of the order which would permit it to have the option of clearly and conspicuously disclosing obligations attendant upon acceptance of the free or nominally priced offer and then clearly and conspicuously disclosing the complete terms of the offer elsewhere. Thus, the alternative language would not require that respondent disclose all the conditions "within close proximity to the free or other offer" as is now mandated.

The Commission has concluded that the petition is in the public interest and should be granted. The proposed modification should be sufficient to ensure that consumers are aware of their obligations in accepting the free or other offer. Not only is respondent required by the modified order to disclose clearly and conspicuously and within close proximity to the offer that there are other conditions that a consumer assumes upon accepting the offer, but the respondent must clearly and conspicuously set forth elsewhere in the advertisement the complete details, conditions, and obligations. Thus, assuming that the proper language is used, a consumer can be expected to be aware of the obligations attendant upon acceptance of the offer. Moreover, as noted by G.R.I. in its petition, the proposed modification is identical to that granted on March 17, 1983, by the Commission in *Golden Tabs Pharmaceutical Co., Inc.,* Docket 8792. [101 F.T.C. 410]

Respondent has attached several advertisements to its petition, including those which purport to contain disclosures that would satisfy the proposed modified order. Respondent is advised that, in granting the petition, the Commission does not agree that the attached advertisements, or the disclosures contained therein, would constitute satisfactory compliance with the modified order.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued February 11, 1972, in Docket No. 8828 is hereby modified to read as follows:

ORDER

It is ordered, That respondent G.R.I. Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of "Bio-Rich Beauty Cream," "Over Fifty Capsulets," and "Beauty Kits," or any food, drug or cosmetic, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing the dissemination of, by means of the United States mail or by means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that:

(a) Any product is offered "free" or under any other terms where the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless all of the conditions of the plan are disclosed clearly and conspicuously and within close proximity to, the "free" or other offer;

or, alternatively,

any product is offered free or under any other terms when the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless (1) respondent discloses clearly, conspicuously, and within close proximity to the free or other offer that there is a further obligation upon the consumer upon acceptance of the offer, and (2) respondent also discloses clearly and conspicuously elsewhere in the advertisement the complete details, conditions, and obligations attendant upon acceptance of the offer, provided further that, if the advertisement includes a coupon, signature space, or other designated means by which the consumer is intended to accept the offer, respondent discloses clearly and conspicuously on or in close proximity to the coupon or other space provided for acceptance of the offer the complete details, conditions and obligations attendant upon acceptance of the offer, but such complete disclosure need not appear more than once in the advertisement, including the coupon.

(b) Persons who respond to advertisements incur no obligation when responding to such advertisements: *Provided, however,* this prohibition shall not apply to a representation that persons receiving merchandise are under no obligation to keep or to continue receiving such merchandise.

(c) Respondent's products are guaranteed in any manner unless the nature and extent of the guarantee, the identity of the guarantor and the manner in which said guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction therewith; and unless the respondent fully, satisfactorily and promptly performs all of its obligations and requirements under the terms of the guarantee.

(d) The freshness or potency of any vitamin-mineral or cosmetic preparation is guaranteed.

(e) Any offer is limited in time or in any other manner unless any represented limitation or restriction is actually imposed and adhered to.

(f) Women of any special age require special care or attention for their skin or skin problems.

(g) Bio-Rich Beauty Cream or the ingredients thereof is new or is a recent discovery.

(h) Any price for respondent's products is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondent in the recent regular course of its business, and unless respondent has maintained business records that substantiate an established selling price at which such products have been sold in substantial quantities in the recent regular course of its business; or misrepresenting in any manner the savings available to purchasers. In the sale of the products of others, including assortments and/or kits containing the products of others, a representation of comparable value shall not violate the provisions of this paragraph when such comparable value is based on respondent's good faith reliance upon a manufacturer's assurance of value based on (1) substantial recent sales of an item at a given price, or (2) in the case of items that are packaged in a size not otherwise sold to the public, based on a prorata adjustment from the prices obtained for those sizes of the items that have been sold recently and in substantial quantities. Written evidence of said manufacturer's assurance of value shall be maintained by respondent.

(i) That regulations and scientific controls relating to respondent's products have been strictly observed, or in any manner representing that respondent's products conform to any stricter regulations or controls than those required for any other similar products.

(j) That the use of respondent's vitamin-mineral "capsulets" will be of benefit in the prevention of the symptoms of tiredness, nervousness, restlessness, listlessness, worry, irritability, tension, depression, lack of pep or energy, loss of vigor or vitality, or lack of alertness, unless such advertisement expressly limits the effectiveness of the preparation to those persons whose symptoms are due to a deficiency of Vitamin B-1 (Thiamin), Vitamin B-2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide, and further, unless such advertising clearly and conspicuously reveals the facts that in the great majority of persons, or of any age, sex, or other group or class thereof, who experience such symptoms, these symptoms are caused by conditions other than those which may respond to the use of respondent's vitamin-mineral preparation, and that in such persons the preparation will not be of benefit.

(k) That the ingredients in respondent's vitamin-mineral preparation other than Vitamin B-1 (Thiamin), Vitamin B-2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide will be of benefit in the prevention of tiredness, nervousness, restlessness, listlessness, worry, irritability, tension, depression, lack of pep or energy, loss of vigor or vitality, or lack of alertness.

2. Dissemination, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondent's products in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited by Paragraph 1 hereof.

It is further ordered, That respondent G.R.I. Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of "Bio-Rich Beauty Cream," "Over Fifty Capsulets," and "Beauty Kits," or any food, drug or cosmetic product in commerce, as "commerce" is defined by the Federal Trade Commission Act, do forthwith cease and desist from:

1. Shipping or sending any merchandise to any person without the prior expressed request or consent of the person to whom such merchandise is sent, unless such merchandise is a free sample and has attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender in regard to that merchandise.

2. Mailing any bill or any dunning communication for any merchandise shipped or sent without the prior expressed request or consent of the recipient, to such recipient.

3. Shipping or sending merchandise to any person and attempting, or causing to attempt, the collection of the price thereof when a notification of cancellation for any further shipments of merchandise has been sent by such person: *Provided, however,* that it shall be a defense in any enforcement proceeding instituted under this prohibition for respondent to affirmatively establish that: (1) such merchandise had been shipped less than ten (10) working days after said notification of cancellation had been received by respondent in the regular course of business, and (2) no invoices, except for that one accompanying the shipment of said merchandise, or any notice requesting payment for or return of said merchandise had been sent or caused to be sent by respondent to such person concerning said shipment, except that respondent may send one notice to such person advising that the cancellation has been effected and requesting the return of such merchandise if respondent clearly discloses in said notice that such person is under no obligation to return said merchandise, and respondent promises to pay for the return of said merchan-

dise and further, respondent, in fact, reimburses such person for any expenses incurred in its return.

4. Attempting, or causing to attempt, the collection of the price for merchandise when such merchandise has been refused and returned to respondent: *Provided, however,* that it shall be a defense in any enforcement proceeding instituted under this prohibition for respondent to affirmatively establish that any collection notice sent in regard to said refused and returned merchandise could not reasonably be halted after the return of said merchandise, except that this defense shall be unavailable with respect to any collection notice sent more than twenty (20) days after the date on which such merchandise has been refused, returned, and received by respondent in the regular course of business.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this modified order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

It is further ordered, That the foregoing modification shall become effective upon service of this Order.

IN THE MATTER OF

PHARMTECH RESEARCH, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9168. Complaint, July 27, 1983—Decision, May 1, 1984

This consent order requires a San Francisco, Calif. manufacturer of nutritional supplements, among other things, to cease representing that findings of a 1982 National Academy of Sciences report entitled *Diet, Nutrition and Cancer* support the claim that Daily Greens, a dehydrated vegetable tablet, reduces the incidence of any type of cancer. The order requires the company to substantiate representations concerning benefits to health with reliable and competent scientific evidence, and to maintain accurate records which either support or contradict such claims. Further, respondent is prohibited from misrepresenting the purpose, content or conclusion of any scientific test, research article or scientific opinion.

Appearances

For the Commission: *Andrew B. Sacks* and *Reid B. Horwitz.*

For the respondent: *Jon Henry Kouba, Adams, Kouba & Dickson,* San Francisco, Calif. and *Eugene Lambert, Covington & Burling,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that PharmTech Research, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located in San Francisco, California.

PAR. 2. Respondent is now and for some time in the past has been engaged in the manufacture, offering for sale, and sale of nutritional supplements, including Daily Greens, and other products for personal or household use by members of the general public (hereinafter "consumer products").

Par. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising and promotional material, including, but not limited to, the advertising referred to herein, to promote the sale of Daily Greens.

Par. 4. Respondent operates in various States of the United States and in the District of Columbia. Respondent's manufacturing, offering for sale, sale, and distribution of nutritional supplements, including Daily Greens mentioned herein constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 5. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements for nutritional supplements, including Daily Greens, by various means in or affecting commerce, including *inter alia* national magazines and newspapers distributed by the mail and across state lines, and broadcasts transmitted across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products.

Par. 6. Typical statements in said advertisements, and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements and promotional materials attached hereto as Exhibits A through D. Specifically, the aforesaid advertisements and promotional materials contain the following statements:

> (A) Cabbage, Brussels Sprouts, Carrots, Cauliflower, Spinach and Broccoli vs. Cancer.
>
> (B) According to the National Academy of Sciences,* a regular diet of cruciferous (cabbage, brussels sprouts, broccoli, cauliflower) and carotene-rich (carrots and spinach) vegetables is associated with a reduction in the incidence of certain cancers.
>
> Of course you may not really like these vegetables. Or you may not cook them quite right. And even if you have all that worked out, you still have to contend with seasonal availability.
>
> That's why there are Daily Greens. . .
>
> * *Diet, Nutrition and Cancer,* National Academy Press, 1983.
>
> (C) The National Academy of Sciences thinks a balanced diet may reduce your risk of cancer. Daily Greens were designed to be a part of that balanced diet. . .
>
> (D) [S]ubstantial evidence exists that regular consumption of cruciferous vegetables is associated with a reduction in the incidence of certain cancers. Thanks to the process of dehydration, Daily Greens allow you to eat cruciferous vegetables regularly, with the convenience of a food supplement.
>
> (E) Help your body defend itself.
>
> (F) According to this recent report from the National Research Council, a combination of cruciferous and carotene-rich vegetables have been found to help our bodies build certain *important* biological defenses.

Par. 7. Through the use, *inter alia,* of the statements referred to in

Paragraphs Six (A) through Six (F), and other representations contained in advertisements or promotional materials not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that:

(a) The findings of the National Academy of Sciences *Diet, Nutrition and Cancer* Report support the claim that use of Daily Greens, or food supplements of dehydrated vegetables such as Daily Greens, is associated with a reduction in the incidence of certain cancers in humans.

(b) The National Research Council findings support a claim that the use of Daily Greens, or food supplements of dehydrated vegetables such as Daily Greens, may help consumers build important biological defenses.

(c) The use of Daily Greens is associated with a reduction in the incidence of certain cancers in humans.

Par. 8. The representation referred to in Paragraph Seven (a) is false for the reasons, *inter alia,* that the findings of the National Academy of Sciences' *Diet, Nutrition and Cancer* Report do not support the claim that the use of Daily Greens or food supplements of dehydrated vegetables such as Daily Greens is associated with a reduction in the incidence of certain cancers.

Par. 9. The representation referred to in Paragraph Seven (b) is false, for the reasons, *inter alia,* that no findings of the National Research Council support such a claim.

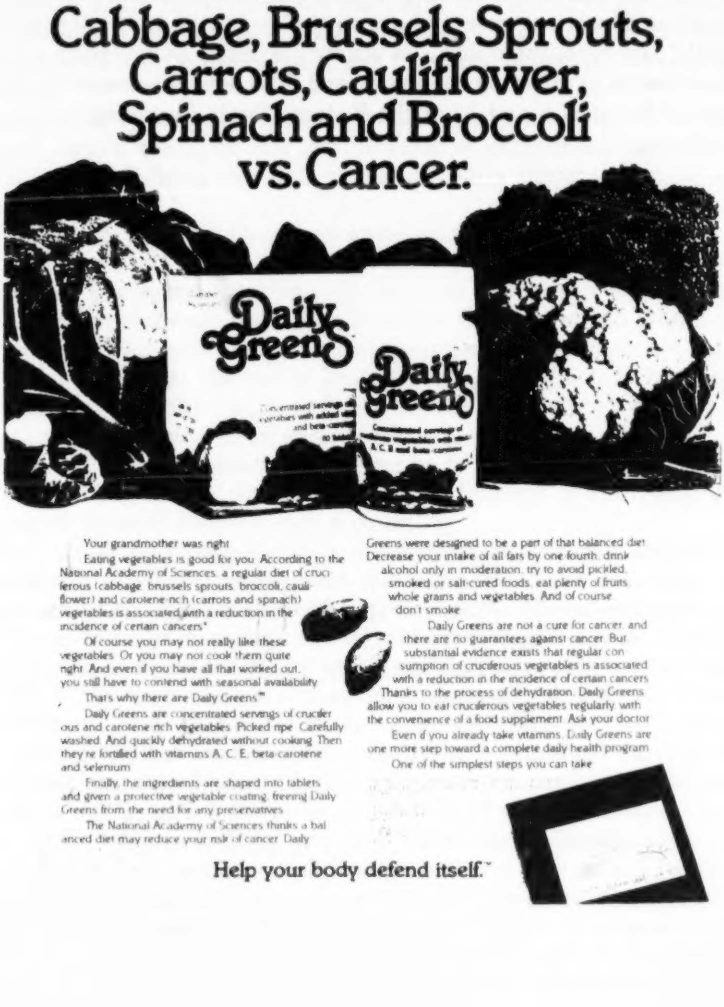
Par. 10. At the time respondent made the representation alleged in Paragraph Seven (c), respondent did not possess and rely upon a reasonable basis for making such representation. Therefore, respondent's making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

Par. 11. Through the use of the advertisements referred to in Paragraph Seven, and other advertisements not specifically set forth herein, respondent has represented, directly or by implication, that it possessed and relied upon a reasonable basis for the representation set forth in Paragraph Seven (c) at the time of the initial dissemination of the representations and each subsequent dissemination. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

Par. 12. The use by respondent of the aforesaid statements, representations, acts, and practices, directly or by implication, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid statements, representations, acts, and practices, have had and now have the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said statements and representations were and are true and complete and to induce such persons to purchase Daily Greens by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondent, herein alleged as deceptive, were and are to the prejudice and injury of the public and constituted and now constitute unfair or deceptive acts or practices in or affecting commerce and false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

ATTACHMENT A


Daily Greens
Daily Greens

Cabbage, Brussels Sprouts, Carrots, Cauliflower, Spinach and Broccoli vs. Cancer.

Your grandmother was right

Eating vegetables is good for you According to the National Academy of Sciences a regular diet of cruciferous (cabbage brussels sprouts broccoli, cauliflower) and carotene rich (carrots and spinach) vegetables is associated with a reduction in the incidence of certain cancers*

Of course you may not really like these vegetables Or you may not cook them quite right And even if you have all that worked out, you still have to contend with seasonal availability

That's why there are Daily Greens™

Daily Greens are concentrated servings of cruciferous and carotene rich vegetables Picked ripe Carefully washed And quickly dehydrated without cooking Then they're fortified with vitamins A. C. E. beta carotene and selenium

Finally the ingredients are shaped into tablets and given a protective vegetable coating freeing Daily Greens from the need for any preservatives

The National Academy of Sciences thinks a balanced diet may reduce your risk of cancer Daily Greens were designed to be a part of that balanced diet Decrease your intake of all fats by one fourth, drink alcohol only in moderation, try to avoid pickled, smoked or salt-cured foods, eat plenty of fruits whole grains and vegetables And of course don't smoke

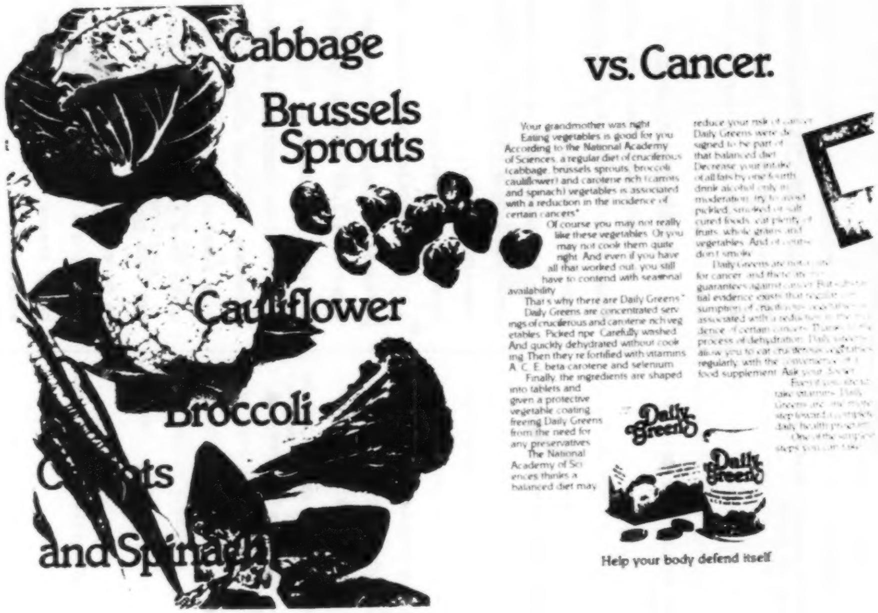
Daily Greens are not a cure for cancer, and there are no guarantees against cancer But substantial evidence exists that regular consumption of cruciferous vegetables is associated with a reduction in the incidence of certain cancers Thanks to the process of dehydration, Daily Greens allow you to eat cruciferous vegetables regularly, with the convenience of a food supplement Ask your doctor

Even if you already take vitamins, Daily Greens are one more step toward a complete daily health program

One of the simplest steps you can take

Help your body defend itself.™

ATTACHMENT B



Cabbage
Brussels Sprouts
Cauliflower
Broccoli
Carrots
and Spinach
vs. Cancer.

Your grandmother was right.

Eating vegetables is good for you. According to the National Academy of Sciences, a regular diet of cruciferous (cabbage, brussels sprouts, broccoli, cauliflower) and carotene rich (carrots and spinach) vegetables is associated with a reduction in the incidence of certain cancers.*

Of course you may not really like these vegetables. Or you may not cook them quite right. And even if you have all that worked out, you still have to contend with seasonal availability.

That's why there are Daily Greens.™

Daily Greens are concentrated servings of cruciferous and carotene rich vegetables. Picked ripe. Carefully washed. And quickly dehydrated without cooking. Then they're fortified with vitamins A, C, E, beta carotene and selenium.

Finally, the ingredients are shaped into tablets and given a protective vegetable coating, freeing Daily Greens from the need for any preservatives.

The National Academy of Sciences thinks a balanced diet may reduce your risk of cancer. Daily Greens were designed to be part of that balanced diet. Decrease your intake of all fats by one fourth, drink alcohol only in moderation, try to avoid pickled, smoked or salt cured foods, eat plenty of fruits, whole grains and vegetables. And of course don't smoke.

Daily Greens are not a cure for cancer and there are no guarantees against cancer. But substantial evidence exists that regular consumption of cruciferous vegetables is associated with a reduction in the incidence of certain cancers. Thanks to the process of dehydration, Daily Greens allow you to eat cruciferous vegetables regularly, with the convenience of a food supplement. Ask your doctor.

Even if you already take vitamins, Daily Greens are one more step toward a complete daily health program.

One of the simplest steps you can take.

Help your body defend itself

ATTACHMENT C

PHARMTECH RESEARCH, INC.

VIDEO	AUDIO
Open on white type on black screen, as delivered in audio	1. MALE ANNCR. V/O (Deep Voiced): The following message concerns a revolutionary new concept in diet and nutrition.
Dims to ECU Female annr. in LIMBO setting.	2. ON-CAMERA FEMALE ANNCR.: Did you know that there are certain foods that can actually help your body defend itself?
Cuts to MS Of her as she holds up research.	3. It's true. And, according to a recent 700-page report from the Nati Research Council, a combination of cruciferous vegetables
Diss. and pan display of fresh vegetables.	4. like cabbage, cauliflower, bruss sprouts, broccoli...and carotene-ric vegetables like carrots and spinach
Diss. back to MS of anncr. as she moves to display of fresh vegetables. She gestures to array of vegetables.	5. have been found to help our bodi build certain important biological defenses. Because cooking can strip away nutrients, to get the most benefits from any vegetables, you should eat them raw. But, that can be diffic to do every day.
Cut to ECU of bottle as she holds it up	6. So, I'd like to introduce you to Daily Greens - a new concept in nutrition.

VIDEO	AUDIO
7. Hold above shot. SUPER: NOT JUST A VITAMIN...A FOOD	7. Daily Greens are NOT just anoth vitamin pill -- they are a food.
8. Diss. and pan along vegetables and petri dishes of powdered vegetables.	8. They're actually natural, fres cruciferous and carotene-rich vegetables, dehydrated and compressed, without cooking, so you get the nutrients, the fiber and the rough that's so good for you.
9. Diss. back to anncr. holding bottle	9. Just one Daily Green tablet a day gives you the important
10. Diss. and pan vegetables to bottle. SUPER: FORTIFIED WITH VITAMINS A, C & E PLUS BETA-CAROTENE	10. nutritional elements you'd get from eating these fresh, raw vegetables. And, Daily Greens are fortified with vitamins A, C, E plu beta-carotene.
11. Diss. back to anncr. with bottle sitting in display of vegetables.	11. So, if you aren't getting encu raw vegetables every day -- rely on Daily Greens --
12. Diss. to bottle, package and tablets on sweep	12. the food that not only gives y the real thing ... it gives it to you raw, so it can do you the most
13. Shrink above shot into mortise on black. SUPER: HELP YOUR BODY DEFEND ITSELF	13. Daily Greens -- to help your b defend itself.

ATTACHMENT D

VIDEO	AUDIO
1. Open on white type on black screen, as delivered in audio.	1. MALE ANNCR. V/P (Deep-Voiced): The following message concerns a revolutionary new concept in diet and nutrition.
2. Diss. to MCU of female anncr. as she holds up research.	2. ON-CAMERA FEMALE ANNCR.: According to this recent report fr the National Research Council, a combination of cruciferous
3. Diss. and pan display of fresh vegetables.	3. and carotene-rich vegetables h been found to help our bodies buil certain important biological defen
4. Diss. back to her at display of fresh vegetables.	4. Of course, to get the most fro any vegetable, you should eat them But that's difficult to do every d
5. Cut to ECU of bottles as she holds up bottle of Daily Greens	5. So I'd like to introduce you t Daily Greens.
6. Hold above shot. SUPER: NOT JUST A VITAMIN...A FOOD	6. Daily Greens are NOT just anot vitamin pill --
7. Diss. and move along vegetables and petri dishes of powdered vegetables	7. They're natural, fresh, crucife and carotene-rich vegetables, dehydrated and compressed
8. Diss. back to anncr. with bottle.	8. to give you the important nutri tional elements that could be so vi to your future health.

9. Diss. to CU of bottle and vegetables SUPER: FORTIFIED WITH VITAMINS A, C & E PLUS BETA-CAROTENE	9. And, Daily Greens are fortifie with vitamin A, C and E ... plus beta-carotene.
10. Diss. back to anncr.	10. So, if you're not getting enou raw vegetables every day ...
11. Diss. to product shot	11. rely on Daily Greens --
12. Add SUPER: HELP YOUR BODY DEFEND ITSELF	12. to help your body defend itsel

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent PharmTech Research, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1750 Montgomery Street, in the City of San Francisco, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent PharmTech Research, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of Daily Greens, or any other product containing dehydrated vegetables, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, contrary to fact, that findings of the National Academy of Sciences, or findings contained in the 1982 Report entitled *Diet, Nutrition, and Cancer,* support the claim that use of the product is associated with a reduction in incidence of any type of cancer.

II

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any product for personal or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, the purpose, content, sample, reliability, results or conclusions of any scientific test, research article, or any other scientific opinion or data.

III

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, packaging, offering for sale, sale, or distribution of any product for personal or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning any benefit to health to be derived from using any such product unless, at the time of such representation, respondent possesses and relies upon reliable and competent scientific evidence that substantiates such representation. "Reliable and competent" shall mean for purposes of this Order those tests, analyses, research, studies, or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

IV

It is further ordered, That respondent or its successors or assigns maintain accurate records:

1. Of all materials that were relied upon by respondent in disseminating any representation covered by this order.

2. Of all test reports, studies, surveys, or demonstrations in its possession or control or of which it has knowledge that contradict any representation made by respondent that is covered by this order.

Such records shall be retained by respondent or its successors or assigns for three years from the date that the representations to which they pertain are last disseminated. *It is further ordered,* That any such records shall be retained by respondent or its successors or assigns and that respondent or its successors or assigns shall make such documents available to the Commission for inspection and copying upon request.

V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VI

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions, and to all present and prospective distributors of products manufactured or marketed by respondent.

VII

It is further ordered, That respondent shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

CARTER HAWLEY HALE STORES, INC.
d/b/a THE EMPORIUM and EMPORIUM-CAPWELL

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-3133. Complaint, May 9, 1984—Decision, May 9, 1984

This consent order requires a San Francisco, Calif. retailer to comply with the billing error resolution procedures of the Truth in Lending Act (the Act) and its implementing Regulation Z. Respondent must acknowledge a customer's written billing error notice within 30 days; resolve the dispute or mail an explanation as to why a statement is believed correct within 2 billing cycles; and maintain for at least two years, records evidencing compliance with the Act's provisions. Respondent is prohibited from attempting to collect any amount of a bill in dispute, including any finance charge computed on such amount; and must forfeit the right to collect the amount in dispute up to $50., should it fail to comply with any of the Act's requirements.

Appearances

For the Commission: *Ralph E. Stone* and *Earl Stackhouse.*

For the respondent: *Jeremy V. Wisot, MacFarlane, Schaefer & Haun,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder by the Board of Governors of the Federal Reserve System, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Carter Hawley Hale Stores, Inc., a corporation, doing business as The Emporium and Emporium-Capwell, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Carter Hawley Hale Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 550 South Flower Street, Los Angeles, California. Respondent Carter Hawley Hale Stores, Inc. does business presently through a division under the name of "Emporium-Capwell" and has done business in the past through that same division under the name of "The Emporium" with the division's principal office located at 835 Market Street, San Francisco, California. Respondent Carter Hawley Hale Stores, Inc. is responsible for the formulation, control and direction of the policies, acts, and practices of its Emporium-Capwell division, including the acts and practices hereinafter set forth.

PAR. 2. Respondent Carter Hawley Hale Stores, Inc., through its aforesaid Emporium-Capwell division, advertises, sells, and distributes retail merchandise to the public.

PAR. 3. At all times relevant hereto, respondent in the ordinary course of business did and does regularly extend, offer to extend, arrange or offer to arrange "consumer credit" for its customer's purchases, and has been and is a "creditor" as those terms are defined in Section 226.2(p) and (s) of Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601 *et seq.*), duly promulgated by the Board of Governors of the Federal Reserve System.[1] The transactions involve the extension of "open end credit," as defined in Section 226.2(x) of Regulation Z.

PAR. 4. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices herein set forth, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Count I

Alleging violations of the Truth in Lending Act and Regulation Z, and of the Federal Trade Commission Act, the allegations of Paragraphs One through Four are incorporated by reference herein as if fully set forth verbatim.

PAR. 5. Subsequent to October 28, 1975, pursuant to its aforesaid extensions of credit, respondent has in many instances received from customers "proper written notification of a billing error," as defined in Section 226.2(cc) of Regulation Z. In numerous such instances respondent has:

1. Contrary to the requirements of Section 226.14(a)(1) of Regulation Z, failed to take any of the following actions within 30 days after receipt of said notification:

a. Mail or deliver to the customer a written acknowledgment thereof;

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[1] All references to the Truth in Lending Act and Regulation Z contained in this complaint shall refer to the Truth in Lending Act as amended to March 23, 1976 and Regulation Z as amended to March 23, 1977.

b. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

c. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

2. Contrary to the requirements of Section 226.14(a)(2) of Regulation Z, failed to take either of the following actions within the lesser of 90 days or two complete billing cycles from the date of receipt of the notification:

a. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

b. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

3. Contrary to the requirements of Section 226.14(a)(2) of Regulation Z, taken or caused action, prior to the time the dispute has been resolved, to collect:

a. A portion of the amount indicated in the customer's notification as being a billing error; or

b. A finance charge, late payment charge, or other charge computed on such disputed amount.

4. Contrary to the requirements of Section 226.14(b)(2) of Regulation Z, failed to credit customers' accounts with the finance charges, late payment charges or other charges imposed as the result of erroneous billings.

5. Contrary to the requirements of Section 226.14(f)(1) of Regulation Z, failed to forfeit its right to collect from the customer the amount indicated to be a billing error, including any finance charge or other charges imposed thereon, up to a maximum of $50.00 for each item or transaction indicated by the customer to be a billing error.

PAR. 6. Pursuant to Section 103(s) of the Truth in Lending Act, respondent's aforesaid failures to comply with the foregoing provision of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof (15 U.S.C. 1607), respondent has thereby engaged in unfair and deceptive acts and practices in violation of Section 5(a)(1) of the Federal Trade Commission Act, all to the prejudice and injury of the public.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Carter Hawley Hale Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 550 South Flower Street, Los Angeles, California. Respondent Carter Hawley Hale Stores, Inc. does business presently through a division under the name of "Emporium-Capwell" and has done business in the past through that same division under the name of "The Emporium" with the division's principal office located at 835 Market Street, San Francisco, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

A. For the purposes of this Order, the terms *billing error, billing-error notice, cardholder, consumer credit,* and *credit card* shall be defined as these terms are defined in Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601 *et seq.*).[1]

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[1] All reference to the Truth in Lending Act and Regulation Z contained in this Order shall refer to the Truth in Lending Act as amended to March 31, 1980 and Regulation Z as amended to April 1, 1981.

B. This Order shall apply only to the Emporium-Capwell division of Carter Hawley Hale Stores, Inc.

I.

It is ordered, That respondent Carter Hawley Hale Stores, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension by or on behalf of Emporium-Capwell, or any organization continuing the business of Emporium-Capwell, of "open end credit," including "consumer credit" extended through use of a "credit card," as those terms are defined in Regulation Z, the implementing regulation of the Truth in Lending Act, do forthwith cease and desist from:

A. Failing, within 30 days after receipt of any billing-error notice, to mail or deliver a written acknowledgement thereof to the customer's current designated address as required by Section 226.13(c)(1) of Regulation Z, unless:

1. the customer has agreed, within such 30-day period, that the periodic statement is correct; or
2. respondent has taken, within such 30-day period, the applicable action specified in Paragraph I.B.1-3 of this Order.

B. Failing, not later than two complete billing cycles (and in no event more than 90 days) from the date of receipt of any billing-error notice, to resolve the dispute by:

1. correcting the billing error and crediting the customer's account in the full amount indicated by the customer to have been erroneously billed and related finance or other charges, as applicable, and mailing or delivering to the customer a written notification of the correction(s) as required by Section 226.13(e) of Regulation Z; or
2. correcting the billing error and crediting the customer's account by an amount different from that indicated by the customer as being erroneously billed and related finance or other charges, as applicable, and mailing or delivering to the customer a written explanation setting forth the reasons for respondent's belief that the billing error alleged by the customer is incorrect in part, accompanied by copies of documentary evidence of the customer's indebtedness if such evidence has been requested by the customer, as required by Section 226.13(f) of Regulation Z; or
3. mailing or delivering to the customer, after conducting a reasonable investigation, a written explanation that sets forth the reason(s) why respondent believes the periodic statement is correct and, if the

customer has requested, furnishing copies of documentary evidence of the customer's indebtedness, as required by Section 226.13(f) of Regulation Z;

Provided, however, That respondent need not perform the actions specified in this Paragraph I.B. if the customer has agreed, not later than two complete billing cycles (and in no event more than 90 days) from the date of respondent's receipt of the billing-error notice, that the periodic statement is correct.

C. Taking any action or causing any action to be taken, prior to the time the dispute has been resolved, as provided in Paragraph I.B. of this Order, to collect any portion of any required payment that the consumer believes is related to the disputed amount, including related finance or other charges.

D. Failing, in each instance where respondent does not comply with all applicable requirements of Section 226.13 of Regulation Z, to forfeit the right to collect from the customer the amount indicated to be a billing error, including corresponding finance and other charges imposed thereon, up to $50.00, as required by Section 161(e) of the Truth in Lending Act, 15 U.S.C. 1666(e).

E. Failing to comply with any other requirement of Section 226.13 of Regulation Z.

F. Failing to keep evidence of compliance with Regulation Z for a period of two (2) years as required by Section 226.25(a) of Regulation Z, and to make the records available for inspection as required by Section 226.25(b) of Regulation Z.

II.

A. *It is further ordered,* That respondent distribute a copy of this Order to each of Emporium-Capwell's supervisory personnel having procedural or policy responsibilities with respect to the subject matter of this Order, and that respondent secure a signed statement acknowledging receipt of said Order.

B. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution of subsidiaries or divisions or any other change in the corporation which may affect compliance obligations arising out of the order.

C. *It is further ordered,* That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

GREAT LAKES CHEMICAL CORPORATION, ET. AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket No. 9155. Complaint, June 23, 1981—Decision, May 23, 1984

This consent order requires the leading producer of elemental bromine and brominated flame retardants in the U.S., to grant PPG Industries, Inc. (PPG), according to a prescribed non-exclusive licensing agreement, all the latest technology and know-how on brominated flame retardants acquired from Velsicol Chemical Corp. The order also requires Great Lakes to enter into other agreements that would govern the operation and ownership rights of Arkansas Chemicals, Inc. (ACI), a joint bromine production venture between Great Lakes and PPG. The agreements eliminate certain restrictions on PPG's use of bromine purchased from ACI; permit PPG to sell elemental bromine in the merchant market; allow PPG to use ACI bromine in the production of all brominated compounds, including flame retardants; and require Great Lakes to purchase a specified amount of bromine from ACI annually. In addition to specific record keeping and reporting requirements, the order prohibits Great Lakes from acquiring any concern engaged in the production of elemental bromine or brominated flame retardants without prior Commission approval for a period of 10 years.

Appearances

For the Commission: *John V. Lacci,* Washington, D.C.

For the respondent: *Donald W. Ruppert, Dan Vittum, Donald G. Kempp, Jr., David B. Garten, Michael W. Vary, Richard W. Young, Kirkland & Ellis,* Chicago, Ill. and *Daniel F. Attridge, Kirkland & Ellis,* Washington, D.C. for respondent Great Lakes Chemical Corporation.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents, Great Lakes Chemical Corporation ("Great Lakes"), Northwest Industries, Inc. ("Northwest"), and Velsicol Chemical Corporation ("Velsicol"), subject to the jurisdiction of the Commission, have agreed to an acquisition by Great Lakes of Velsicol's El Dorado, Arkansas facility ("El Dorado") and its bromine derivative technology and patents that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. *Definitions*

1. For the purposes of this Complaint, the following definitions shall apply:

(a) *Elemental bromine* is a nonmetallic halogen found in natural brines, salt lakes, seas, and oceans;

(b) A *flame retardant* is a chemical compound which when added to, or reacted with, a specific polymer system ((*e.g.*, a plastic) serves to reduce the flammability of the polymer system by making it more difficult to ignite or by making it burn more slowly;

(c) A *brominated flame retardant* is a flame retardant based on the element bromine; and

(d) *ACI* is Arkansas Chemicals, Inc., a 50-50% joint venture between Great Lakes and PPG Industries, Inc. engaged in the production of elemental bromine in El Dorado, Arkansas.

II. *Great Lakes Chemical Corporation*

2. Respondent Great Lakes Chemical Corporation is a Delaware corporation with its principal place of business in West Lafayette, Indiana. Great Lakes' major manufacturing facilities are located in El Dorado, Arkansas and Marysville, Arkansas.

3. Great Lakes is engaged in the production and sale of elemental bromine, brominated flame retardants, industrial and specialty chemicals (*e.g.*, water sanitizers and oil and gas drilling completion fluids), and agricultural pesticides. In 1980, Great Lakes had net sales of $126.7 million and a net income of $18.9 million.

4. Great Lakes is the leading producer and marketer of elemental bromine and brominated flame retardants in the United States.

5. Great Lakes is actively involved in the day-to-day management and business decisions of ACI, a major domestic producer of elemental bromine.

III. *Northwest Industries, Inc.*

6. Northwest Industries, Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois. Northwest is a management and holding company whose operating units produce and sell industrial, consumer, and chemical products. In 1980, Northwest had net sales of $2.8 billion and a net income of $155.4 million.

IV. *Velsicol Chemical Corporation*

7. Velsicol Chemical Corporation, a wholly owned subsidiary of Northwest, is a Delaware corporation with its principal place of business in Chicago, Illinois. Velsicol was formed through the 1976 merger of the Michigan Chemical Corporation and the Velsicol Chemical Corporation, then both wholly owned subsidiaries of Northwest.

8. Velsicol is engaged in the production and sale of elemental bromine, brominated and non-brominated flame retardants, other specialty chemicals, and agricultural pesticides. All of Velsicol's elemental bromine and most of its flame retardants are produced at its El Dorado, Arkansas facility.

9. Velsicol is a leading domestic producer of brominated flame retardants and is a significant producer and marketer of elemental bromine in the United States.

V. *Jurisdiction*

10. At all times relevant herein, each of the companies named in this complaint has been engaged in or affected commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

VI. *The Proposed Acquisition*

11. On March 9, 1981, Great Lakes agreed to acquire Velsicol's elemental bromine and brominated flame retardant businesses for $29.7 million. Among the assets included in the agreement are Velsicol's El Dorado elemental bromine and brominated flame retardant facility, all of Velsicol's bromine derivative research, technology, and patents developed at El Dorado and Velsicol's Ann Arbor, Michigan research facility, and Velsicol's bromine brine reserves.

VII. *Trade and Commerce*

12. The relevant product markets are the following:

(a) the production or sale of elemental bromine in the United States ("the elemental bromine market"); and

(b) the production or sale of brominated flame retardants in the United States. ("the brominated flame retardant market").

13. The relevant geographic market is the United States as a whole.

14. In 1980, approximately 371 million pounds of elemental bromine was produced in the United States for a total value of approximately $90 million.

15. The United States elemental bromine market is a highly concentrated industry with a four-firm concentration ratio of approxi-

mately 94.6% based on industry production in 1980. The top two firms, Great Lakes and Dow Chemical Company, accounted for approximately 65.3% of industry production in 1980. Only five firms produced elemental bromine in the United States in 1980, and one of these firms, ACI, is 50% owned and actively managed in its day-to-day operations by Great Lakes.

16. There is a trend toward increasing concentration in the elemental bromine market and the proposed acquisition of Velsicol's assets by Great Lakes will increase the level of four firm concentration in the elemental bromine industry from approximately 94.6% to approximately 100%.

17. Barriers to entry into the elemental bromine market are substantial.

18. Great Lakes and Velsicol are substantial actual competitors in the elemental bromine market.

19. In 1980, Great Lakes was the largest U.S. producer of elemental bromine with a market share of approximately 33%. In addition, Great Lakes actively managed the operations of ACI, the fourth largest producer of elemental bromine, with approximately 8.4% of industry production in 1980.

20. In 1980, Velsicol ranked fifth in the production of elemental bromine in the U.S., with a market share of approximately 5%.

21. Both Great Lakes and Velsicol were leading marketers of elemental bromine in 1980.

22. In 1980, approximately 62.3 million pounds of brominated flame retardants were produced in the United States market. This production had a market value of approximately $60 million.

23. The United States brominated flame retardant market is a highly concentrated industry with the top four firms accounting for approximately 87.7% of industry production in 1980.

24. Great Lakes' acquisition of Velsicol's brominated flame retardant assets will increase the already substantial levels of concentration in the industry. Great Lakes' acquisition will increase the four firm concentration in the brominated flame retardant market from approximately 87.7% to approximately 92.3% and the two firm ratio from approximately 68.9% to approximately 81.0%.

25. Barriers to entry into the brominated flame retardant market are substantial.

26. Great Lakes and Velsicol are substantial actual competitors in the brominated flame retardant market.

27. In 1980, Great Lakes was the leading U.S. producer of brominated flame retardants and accounted for over 50% of industry production.

28. In 1980, Velsicol ranked third in the brominated flame retardant market in the U.S. with a market share of approximately 12%.

VIII. *Effects of the Acquisition*

29. The effect of the proposed acquisition may be substantially to lessen competition or to tend to create a monopoly in the elemental bromine market and in the brominated flame retardant market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) Substantial actual and potential competition between Great Lakes and Velsicol in the relevant markets will be eliminated;

(b) Substantial actual and potential competition between Velsicol and other companies engaged in the production or sale of relevant products will be eliminated;

(c) The ability of Great Lakes' competitors to compete in the elemental bromine market and the brominated flame retardant market will be substantially diminished;

(d) Great Lakes' substantial position in the elemental bromine market and its dominant position in the brominated flame retardant market may be further strengthened and entrenched at the expense of Great Lakes' actual and potential competitors;

(e) The already high levels of industry concentration in the relevant markets will be significantly increased and the trend toward concentration in these markets will be accelerated; and

(f) Barriers to entry in the relevant markets will be significantly raised.

IX. *Violations Charged*

The proposed acquisition constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondents, Great Lakes Chemical Corporation, Northwest Industries, Inc., and Velsicol Chemical Corporation, with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent Great Lakes Chemical Corporation ("respondent"), its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Great Lakes Chemical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Highway 52 Northwest, in the City of West Lafayette, State of Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For Purposes of this Order

(a) *PPG* means PPG Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at One Gateway Center, in the City of Pittsburgh, State of Pennsylvania;

(b) *ACI* means Arkansas Chemicals, Inc., a 50-50 percent joint venture between Great Lakes and PPG, and a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located in the State of Arkansas;

(c) *bromine* means elemental bromine, atomic number 35, the nonmetallic halogen found in natural brines, salt lakes, seas and oceans;

(d) *brominated flame retardants* mean flame retardants containing the element bromine;

(e) *brominated compounds* means chemical compounds, including flame retardants, containing the element bromine;

(f) *concern* means any company or corporation, its directors, officers, employees, and agents; its domestic and foreign predecessors, successors, divisions, subsidiaries, affiliates, and joint ventures (if the company owns or controls 10% or more of the joint venture); and the directors, officers, employees, and agents of the company's predecessors, successors, divisions, subsidiaries, affiliates, and joint venture partners as described above. The words *subsidiary* and *affiliate* refer to any partial as well as total ownership between corporations.

I.

It is ordered, That Great Lakes, its successors and assigns, and its officers, directors, agents, representatives and employees (hereinafter "Great Lakes") shall, upon written application, grant to PPG a non-exclusive license to produce and sell certain brominated compounds in the form of the non-exclusive license agreement set forth in Attachment A. Great Lakes shall remain in compliance with the agreement set forth in Attachment A, and, without prior approval of the Federal Trade Commission, shall not permit any modification, directly or indirectly, of any of the terms of the license agreement referred to in this paragraph.

II.

It is further ordered, That Great Lakes shall notify the Commission in writing of each PPG written request for technology pursuant to the license agreement set forth in Attachment A.

III.

It is further ordered, That Great Lakes shall enter into the agreements set forth in Attachment B, and Appendices 1 and 2 thereto, relating to the operation and ownership rights of ACI, its successors and assigns. Great Lakes shall remain in compliance with the agreements set forth in Attachment B, and the Appendices thereto, and, without prior approval of the Federal Trade Commission, shall not permit any modification, directly or indirectly, of any of the terms of the agreements referred to in this paragraph. In addition, prior to entering into dissolution as provided for in Section 3(b) of Appendix

1 to Attachment B, Great Lakes shall use its best efforts to cause ACI to be sold as an ongoing entity.

IV.

It is further ordered, That, for a period of ten years from the date that this Order becomes final or the date at which all of its obligations under Attachment A cease, whichever is later, Great Lakes shall provide to the Commission copies of all proposed amendments or modifications which have been communicated by Great Lakes or PPG to the other party with respect to any of the terms contained in the agreement set forth in Attachment A. In addition, for a period of ten years from the date that this Order becomes final, Great Lakes shall provide to the Commission copies of all proposed amendments or modifications which have been communicated by Great Lakes or PPG to the other party with respect to any of the terms contained in the agreements set forth in Attachment B, or to any other agreement referenced therein.

V.

It is further ordered, That, Great Lakes shall provide to the Federal Trade Commission copies of all communications between Great Lakes and PPG regarding changes or alleged breaches of the agreements contained in Attachments A and B.

VI.

It is further ordered, That, for a period of ten (10) years from the date this Order becomes final, Great Lakes, its subsidiaries, affiliates, divisions, successors and assigns shall not, without the prior approval of the Federal Trade Commission, directly or indirectly, acquire any stock, share capital or equity interest in any concern engaged in, or the assets of any concern used in, the manufacture of elemental bromine or brominated flame retardants; *provided, however,* nothing in this Order shall prohibit Great Lakes from (1) engaging in any acquisition of a foreign concern that, in the calendar year of the proposed acquisition or in any of the five full calendar years immediately preceding the acquisition, has not manufactured or sold elemental bromine or brominated flame retardants in, or exported these products to, the United States, if, and only if, that foreign concern's worldwide production of elemental bromine did not exceed ten million pounds in any of the three full calendar years immediately preceding the acquisition and its total worldwide production of brominated flame retardants did not exceed four million pounds in any of the three full calendar years immediately preceding the acquisition; (2) becoming a licensee of any patents or technology from such concerns; or (3) making purchases or sales in the ordinary course of business. The application of this paragraph shall be construed to include the acquisition by Great Lakes of any stock or assets of ACI, its successors and assigns, except for adjustments of ownership in ACI as provided for in Paragraph 5 of Attachment B to this Order.

VII.

It is further ordered, That, commencing on the effective date of this Order, respondent Great Lakes shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of this Order.

NOTE: Portions of the attachments relating to the Decision and Order have been redacted because they are commercially sensitive. The bracketed words have been inserted by the Commission in some instances to describe the redacted information.

ATTACHMENT A

AGREEMENT

THIS AGREEMENT is made this September 16, 1983, between GREAT LAKES CHEMICAL CORPORATION, a Delaware corporation whose principal office address is P.O. Box 2200, West Lafayette, Indiana 47906, referred to herein as "Great Lakes"; and PPG INDUSTRIES, INC., a Pennsylvania corporation having its principal office at One Gateway Center, Pittsburgh, Pennsylvania 15222, referred to herein as "PPG"; and the same

WITNESSETH

A. PPG has for many years engaged in the manufacture and sale of ethylene dibromide. It has also engaged in the manufacture and sale of flame retardant chemicals which are not bromine based and has undertaken to develop bromine containing products including flame retardants.

B. PPG intends to enter into the manufacture and sale of bromine based flame retardant chemicals, and to that end it desires to obtain a non-exclusive license to use certain technology owned by Great Lakes which is useful in the production of certain bromine based flame retardant chemicals.

C. Great Lakes is willing to grant to PPG a non-exclusive license to said technology, upon the terms and subject to the conditions and limitations set out in this Agreement.

TERMS

In consideration of the covenants and agreements hereinafter set forth, it is agreed between the parties hereto as follows:

I

General Provisions

1.01 *Scope of Agreement.* This Agreement looks to the grant by Great Lakes to PPG of a non-exclusive license to use certain technology owned by Great Lakes which is useful in the manufacture of certain bromine based flame retardant chemicals.

1.02 *Definitions.* As used herein, the following words and phrases have the following meanings:

a. Product(s) means any one (1) or more of Group A Products and Group B Products.

b. Group A Product means [any one or more of four brominated flame retardants based upon technology acquired from Velsicol Chemical Corporation without substantial modification by Great Lakes.]

c. Group B Product means [any one or more of six brominated flame retardants based upon technology acquired from Velsicol Chemical Corporation with technological modifications made by Great Lakes.]

d. Product Technology means, for each Product, all patent applications and registrations and all of the information relating to such Product disclosed by Great Lakes to PPG pursuant to its obligations under Articles II and III, but shall expressly exclude non-confidential information.

e. Product Technology Conditional License Term, for each Product, means the period ending on the fifth (5th) anniversary of the date on which PPG first sells commercial quantities of such Product manufactured using Product Technology; provided, sales made for the primary purpose of starting the Term and not as the result of good faith best efforts to prosecute commercial production and marketing shall not be deemed the selling of commercial quantities for the purposes of this definition.

f. Net Sales sold by PPG means the gross invoice price of Products less (i) freight charges and demurrages (if any), (ii) sales and use taxes or other governmental charges, taxes, or imposts on the sale or shipment of Products, and (iii) returns. Product used, consumed, or incorporated into another substance, by PPG (or an entity in which it is a participant) shall be deemed sold at the time of such use, consumption, or incorporation at a gross invoice price equal to the gross invoice price then being charged by PPG for the Product sold to others as such, unless the sales of the Product to others are so insubstantial that they do not truly reflect market forces, in which case the Product shall be deemed sold at the gross invoice price then being charged by Great Lakes on the sale of the same Product to third parties, and the Net Sales so generated shall be calculated accordingly. If there are no qualifying sales by either PPG or Great Lakes, the parties shall negotiate in good faith a constructive Net Sales for the Product so used, consumed, or incorporated, allowing for normal commercial margins and profits.

g. Request Date, for each Group A Product, means the earlier of the date on which PPG makes the request for preliminary production data for such Product, as contemplated by Section 2.02, or the date on which PPG makes the request for Product Technology for such Product, as contemplated by Section 2.03. Request Date, for each Group B Product, means the earliest of the date on which PPG makes the request for preliminary production data for such Product, as contemplated by Section 3.02, the date on which PPG makes the request for acquired Product Technology for such Product, as contemplated by Section 3.03, or the date on which PPG makes its request for Product Technology for such Product, as contemplated by Section 3.04.

II

Group A Product Technology

2.01 *Non-Confidential Information.* Within 45 days after receipt of PPG's written request for the non-confidential information relating to a Group A Product, Great Lakes shall furnish to PPG, [upon payment of a negotiated amount,] all non-confidential and non-proprietary documentary information in its possession relating to each such Group A Product, such as publications, technical bulletins, technical service bulletins, and data sheets generally available to customers, and a list of all patent registrations then owned by Great Lakes and relating to such Group A Product. Upon request of PPG, Great Lakes shall provide PPG with Great Lakes' best estimate of the investment required to construct a plant for the manufacture of each Group A Product.

2.02 *Preliminary Production Data.* Within ninety (90) days after the receipt of PPG's request therefor, together with a payment of [a negotiated amount] per Product, Great Lakes will, as to each Group A Product, except [one of the Group A Products,] for which it receives such request and payment, furnish to PPG written documentation for such Group A Product consisting of:

a. a list of major equipment necessary for the manufacture of such Group A Product, in sufficient detail for PPG to make accurate estimates of productivity and costs of procuring, assembling, and erecting the same in a condition suitable for the commercial production of such Group A Product;

b. a list of raw materials necessary for the manufacture of such Group A Product;

c. manpower and utility requirements;

d. a table of expected yields for such Group A Product;

e. a list of those items a. through p. in subsection 2.03(a) which will not be available; and

f. a statement of the significant differences (if any) between the foregoing items a. through d. as practiced on the date of this Agreement and as practiced on the date of the request, in sufficient detail to allow PPG to evaluate a fair fee if one is to be negotiated pursuant to subsection 2.03(b).

As to each Group A Product, except [one of the Group A Products,] for which PPG does not make either a request and payment under this Section 2.02 or a request and payment under Section 2.03 on or before the fourth anniversary of the date of this Agreement, this Article II shall become void and of no further effect.

2.03 *Product Technology.* (a) Within ninety (90) days after the receipt of PPG's written request therefor, together with an additional payment of [a negotiated amount] per Group A Product, Great Lakes will, as to each Group A Product, except [one of the Group A Products,] for which it receives such request and payment, furnish to PPG the Product Technology owned or possessed by Great Lakes for such Group A Product, except [one of the Group A Products,] as such technology is practiced by Great Lakes on the date of this Agreement, including, without limitation, written documentation adequate for PPG to design, construct, and operate a plant for the manufacture on a commercial sale of such Product. Such Product Technology shall include such of the following items as are available with respect to such Product:

a. process description;
b. material balance;
c. process and instrument flow diagram;
d. equipment list and specifications;
e. quality control methods;
f. equipment layouts;
g. raw material specifications;
h. wast stream analysis and toxicity data;

i. operations manuals;
j. motor lists;
k. instrument lists;
l. raw material requirements;
m. utility requirements;
n. manpower requirements;
o. maintenance equipment;
p. Product application techniques.

With respect to [one of the Group A Products,] within ninety (90) days of receiving such a request and payment, Great Lakes will furnish to PPG the entire production technology of [one of the Group A Products] as acquired from Velsicol Chemical Corporation by Great Lakes on July 15, 1981. As to each Group A Product for which PPG does not make such written request and payment on or before the fifth anniversary of the date of this Agreement, Article II shall become void and of no further affect. If a request and payment is made under this Section 2.03 without a prior request as to that Group A Product under Section 2.02, Great Lakes shall not be obligated to make the disclosures required of it under Section 2.02 (except to the extent that they are embodied in the disclosures required of it by this Section 2.03) and PPG shall not be obligated to make the payment referred to in Section 2.02.

(b) Except with respect to [one of the Group A Products,] if the request given under subsection 2.03(a) above states that PPG desires the Product Technology to be as such technology is practiced by Great Lakes on the date the request is made, the parties shall promptly meet and negotiate in good faith the amount of the fee which PPG shall pay for such additional technology.

III

Group B Product Technology

3.01 *Non-Confidential Information.* Within 45 days after receipt of PPG's written request for the non-confidential information relating to a Group B Product, Great Lakes shall furnish to PPG, [upon payment of a negotiated amount,] all non-confidential and non-proprietary documentary information in its possession relating to such Group B Product, such as publications, technical bulletins, technical service bulletins, and data sheets generally available to customers, and a list of all patent registrations then owned by Great Lakes and relating to such Group B Product. Upon request of PPG, Great Lakes shall also provide PPG with Great Lakes' best estimate of the investment required to construct a plant for the manufacture of each Group B Product.

3.02. *Preliminary Production Data.* Within one hundred fifty (150) days after the receipt of PPG's request therefor, together with a payment of [a negotiated amount] per Product, Great Lakes will, as to each Group B Product for which it receives such request and payment, furnish to PPG (a) written documentation for each such Group B Product, based on the Product Technology for such Product as it existed on July 15, 1981, and (b) written documentation for each such Group B Product, based on the Product Technology for such Product as it existed on the date of this Agreement. In both cases, such written documentation shall consist of:

a. a list of major equipment necessary for the manufacture of such Group B Product, in sufficient detail for PPG to make accurate estimates of productivity and costs of procuring, assembling and erecting the same in a condition suitable for the commercial production of such Group B Product;

b. a list of raw materials necessary for the manufacture of such Group B Products;

c. manpower and utility requirements;

d. a table of expected yields for such Group B Product;

e. a list of those items a. through p. referred to in subsection 2.03(a) which will not be available; and

f. a statement of the significant differences (if any) between the foregoing items a. through d. as practiced on the date of this Agreement and as practiced on the date of the request, in sufficient detail to allow PPG to evaluate a fair fee if one is to be negotiated pursuant to subsection 3.05.

As to each Group B Product for which PPG does not make either a request and payment under this Section 3.02 or a request and payment under Section 3.03 or 3.04 on or before the fourth anniversary of the date of this Agreement, this Article III shall become void and of no further effect.

3.03 *Product Technology Acquired by Great Lakes.* Within one hundred and fifty (150) days after receipt of PPG's written request therefor, together with an additional payment of [a negotiated amount] per Group B Product, Great Lakes will, as to each Group B Product for which it receives such request and payment, furnish to PPG the entire Product Technology for such Group B Product acquired by Great Lakes from Velsicol Chemical Corporation, as such technology existed on July 15, 1981 (the date of such acquisition), including, without limitation, written documentation used for or intended for use in the manufacture of such Product and the design, construction and operation of a plant for the commericial manufacture, where applicable, of such Product. Such Product Technology shall include the items listed as items a. through p. of subsection 2.03(a) which are available with respect to such Product.

As to each Group B Product for which PPG does not make such written request and payment on or before the fifth anniversary of the date of this Agreement, Article III shall become void and of no further effect. If a request and payment is made under this Section 3.03 without a prior request as to that Group B Product under Section 3.02, Great Lakes shall not be obligated to make the disclosures required of it under Section 3.02 (except to the extent that they are embodied in the disclosures required of it by this Section 3.03) and PPG shall not be obligated to make the payment referred to in Section 3.02.

3.04 *Product Technology Developed by Great Lakes.* Within one hundred and eighty (180) days after receipt of PPG's written request therefor, together with the additional payment set out below, Great Lakes will, as to each Group B Product for which it receives such request and payment, furnish to PPG the entire Product Technology for such Group B Product, as such technology is practiced on the date of the Agreement, including, without limitation, written documentation used for or intended for use in the manufacture of such Product and the design, construction and operation of a plant for the commercial manufacture, where applicable, of such Group B Product. Such Product Technology shall include those of the items listed as items a. through p. of Section 2.03 which are available with respect to such Product.

The amount of the payment to be made is as follows:

[For each Group B Product, a negotiated amount.]

As to each Group B Product for which PPG does not make such written request and payment on or before the fifth anniversary of the date of this Agreement, Article III shall become void and of no further effect. If a request and payment is made under this Section 3.04 without a prior request as to that Group B Product under Section 3.02, Great Lakes shall not be obligated to make the disclosures required of it under Section 3.02 (except to the extent that they are embodied in the disclosures required of it by this Section 3.04) and PPG shall not be obligated to make the payment referred to in Sections 3.02.

3.05 *Later Development* If the request given under subsection 3.04 states that PPG desires the Product Technology to be as such Technology is practiced by Great Lakes on the date the request is made, the parties shall promptly meet and negotiate in good faith the amount of the fee which PPG shall pay for such additional technology.

IV.

Licenses

4.01 *Group A Product Technology.* Upon the condition that (and only so long as) PPG makes timely payment of the royalty with respect to that Group A Product, as provided in Section 5.01, Great Lakes hereby grants to PPG the non-exclusive irrevocable right and license to use and practice, anywhere in the world, all Product Technology relating to such Group A Product furnished to PPG by Great Lakes pursuant to Article II.

4.02 *Group B Product Technology.* Upon the condition that (and only so long as) PPG makes timely payment of the royalty with respect to that Group B Product, as provided in Section 5.02, Great Lakes hereby grants to PPG the non-exclusive irrevocable right and license to use and practice, anywhere in the world, all Product Technology relating to that Group B Product furnished to PPG by Great Lakes pursuant to Article III.

4.03 *Provisions Common to Licenses.*

(a) Prior to the expiration of the Product Technology Conditional License Term for each Product for which Product Technology has been furnished pursuant to Articles II and III, the rights and licenses granted under sections 4.01 and 4.02 may not be assigned or sublicensed, in whole or in part, to any other legal entity except as and to the extent as may be expressly set out in this instrument. However, provided that such other legal entity first executes an instrument in form and content binding such other entity to all obligations of confidentiality agreed to by PPG in Section 8.01, PPG may, with respect to each Product, subject to the conditions hereafter set out, contract with no more than two entities for those entities to toll convert or custom manufacture for PPG each Product using Product Technology licensed to PPG hereunder; and PPG is hereby authorized to grant such a sublicense as may be strictly necessary for this purpose. The conditions of the preceding sentence are:

First - that for the purpose of selecting toll converters or custom manufacturers, PPG may disclose Product Technology under confidentiality obligations consistent with Section 8.01 to no more than four such potential toll converters or custom manufacturers.

Second - that PPG retain title to the entirety of the Product so manufactured or toll-converted or that the entirety of the Product so manufactured or toll-converted be sold by the manufacturer directly to PPG or to one of its wholly-owned subsidiaries.

Third - that PPG (or its wholly owned subsidiary) shall not resell, directly or indirectly, more than ten percent (10%) of the Product so manufactured or toll-converted to the entity which manufactured or toll-converted it or to any entity which has any material equity in such custom manufacture or toll converter.

Fourth - that any sub-license granted by PPG pursuant to this Section 4.03 shall be exercisable by the grantee thereof only and solely for the purpose of toll converting or custom manufacturing the Product for PPG.

(b) In connection with the sale of a Product produced under a license granted under Sections 4.01 or 4.02, PPG may grant to its customers of that Product the non-exclusive, irrevocable label license to use and sell that Product under any patent owned by Great Lakes covering the use of that Product.

V

Royalties

5.01 *Royalties on Group A Products.* In consideration for the right and license granted by Great Lakes to PPG pursuant to Section 4.01, PPG shall pay to Great Lakes, at the address designated by Great Lakes, a royalty calculated as [a negotiated percentage royalty] of the Net Sales of each Group A Product manufactured using Product Technology and sold during the Product Technology Conditional License Term for such Product.

5.02 *Royalties on Group B Products.* In consideration of the right and license granted by Great Lakes to PPG pursuant to Section 4.02, PPG shall pay to Great Lakes, at the address designated by Great Lakes, a royalty calculated as [a negotiated percentage royalty] of the Net Sales of each Group B Product manufactured using Product Technology, but not more than [a negotiated amount] for any one Group B Product.

5.03 *Time of Payment.* For purposes of Sections 5.01 and 5.02, a Product shall be deemed "sold" by PPG as of the date it is used, consumed, incorporated, shipped or invoiced, whichever is earlier. The royalties payable pursuant to Sections 5.01 and 5.02 shall be computed and paid quarterly. On or before the last day of each April, July, October, and January, PPG shall pay to Great Lakes the royalty contemplated by Sections 5.01 and 5.02 due and payable with respect to the immediately preceding calendar quarter.

5.04. *Medium of Payment.* All royalties due hereunder shall be paid in United States dollars. If sales are effected in a currency other than in United States dollars, then for the purpose of calculating the royalties payable hereunder, the rate of exchange between the United States dollars and the currency of sale shall be the average of the closing dollar buy and sell rates for such currency quoted by Chemical Bank, New York, New York, on the last New York City business day of the calendar quarter in which the sale occurs.

5.05 *Unconditional License.* Upon the expiration of the Product Technology Conditional License Term for each Product (so long as all royalties payable during said Term have been paid in full) PPG shall have an irrevocable non-exclusive transferable right and license in perpetuity to use, practice, license, assign, and sell the Product Technology as to each such Product anywhere in the world, and the provisions of Section 4.03 shall not apply.

5.06 *Failure to Pay.* In the event that PPG defaults by failing to pay, promptly when due, any installment of the royalties to be paid by it under this Article V with respect to any Product, or by failing to observe or perform any other obligation or condition to be observed or performed by it hereunder, Great Lakes may, at its option, give PPG written notice specifying the thing or matter in default. If the default is a delinquent payment it shall bear interest at the prime rate charged by the Chemical Bank in New York, plus two percent (2%). Unless such default is cured within two (2) months following receipt of such notice, or if such default cannot be cured within that time and PPG fails to diligently make efforts to cure the default, Great Lakes may give further written notice terminating this Agreement and all rights and licenses granted by it hereunder; provided, that Great Lakes gives the Federal Trade Commission two (2) months advance written notice that Great Lakes may terminate this Agreement pursuant to this provision. Said notice to the Federal Trade Commission may be given at the same time that Great Lakes gives PPG notice of the default. In the event it is impossible to cure the default, the parties shall (unless Great Lakes waives the default) enter into good faith negotiations to afford Great Lakes reasonable recourse, other than termination, for the default. Termination of this Agreement pursuant to this Section 5.06 shall not release PPG from its obligations to pay the royalties which have become payable to and including the date of termination. This remedy shall not be exclusive, but shall be in addition to any and all other remedies available to Great Lakes in the event of a default by PPG hereunder.

VI

Technical Assistance

6.01 *On-Site Demonstration.* Within ninety (90) days after it has furnished to PPG the Product Technology for a Group A Product, except [one of the Group A Product,] as provided in Section 2.03, or the Product Technology for a Group B Product, as provided in Section 3.04, Great Lakes shall invite PPG to send representatives to attend on-site demonstrations and to observe such actual operations and be adequately advised by Great Lakes with respect thereto as may be necessary or appropriate to facilitate exploitation by PPG of the Product Technology for such Product. The demonstrations and operations will be conducted at the office, laboratory, and manufacturing facility designated by Great Lakes. The demonstrations and operations contemplated by this Section will be completed within one hundred twenty (120) days after the date of Great Lakes' invitation to PPG

6.02 *Start-Up Advice.* Except with respect to [one of the Group A Products] upon request of PPG, Great Lakes shall send to the manufacturing location designated by PPG one (1) or more experienced and qualified engineers to assist in the start-up of not more than one (1) of PPG's plants for the manufacture of each Product, so long as such start-up occurs within four (4) years after the Request Date; provided, that Great Lakes shall not be required by this Section 6.02 to provide assistance at more than an aggregate of three (3) plant sites. Said engineer(s) shall not be obligated to spend more than ten (10) man-days in assisting the start-up of any one such plant.

6.03 *Expenses.* PPG shall bear the entire cost it incurs in the sending of its representatives to attend demonstrations and observe operations pursuant to Section 6.01, including transportation, lodging, and meals. PPG will reimburse Great Lakes for the actual costs incurred by it in the sending of its personnel to assist in the start-up of a PPG manufacturing plant pursuant to Section 6.02. For purposes of this Section 6.03, "actual costs" means the reasonable amounts actually expended by Great Lakes for transporting, lodging, and feeding its engineers, together with a liquidated charge on account of salaries, of $250 per man per day, escalated by the fraction CPR - CPO, where CPO is the All Urban Consumer Index (to the base year 1967 = 100) most recently published prior to the date hereof, and CPR is the value of the same index most recently published prior to the time the services are rendered.

6.04 *Further Assistance.* For a period of not more than one hundred eighty (180) days after start-up of any plant referred to in Section 6.02, provided such start-up shall have occurred within four (4) years after the Request Date, Great Lakes shall, at no charge to PPG, furnish PPG with such additional information as may reasonably be requested by PPG in order to give full effect of the intentions of the parties and the purposes of this Agreement: provided, however, that Great Lakes shall not be obligated to disclose (i) any information relating to a Group A Product, if such information is not included in that Product Technology which Great Lakes is obligated to furnish PPG pursuant to Section 2.03 for such Product practiced on the date of this Agreement, or (ii) any information relating to a Group B Product for which Great Lakes has furnished Product Technology pursuant to Section 3.03, if such information is not included in the Product Technology for such Product as it existed on July 15, 1981, or (iii) any information relating to a Group B Product for which Great Lakes has furnished Product Technology pursuant to Section 3.04, if such information is not included in the Product Technology for such Product practiced on July 15, 1983, or (iv) any information relating to [one of the Group A Products] which was not acquired from Velsicol Chemical Corporation by Great Lakes on July 15, 1981.

VII.

Technology

7.01 *Infringement.* If PPG should become aware of any infringement by a third person of any claim of any patent application or registration licensed or agreed to be licensed by Great Lakes hereunder, it shall notify Great Lakes and Great Lakes shall have the right, at its expense, to prosecute such infringement. If, within thirty (30) days after the date of such notice, Great Lakes has failed to commence prosecution of any such infringement, PPG shall be entitled by itself, at its own expense, to institute and prosecute, in the name (and with the approval) of Great Lakes, such proceedings as PPG may reasonably deem appropriate.

7.02 *Warranties.* Great Lakes hereby warrants and represents that:

a. The technology as used by Great Lakes on the date of this Agreement enables Great Lakes to manufacture such Product in accordance with the specifications set out in Schedule A annexed hereto;

b. All Product Technology, except that respecting [one of the Group A Products,] disclosed to PPG pursuant to Section 2.03 will be the entire technology practiced by Great Lakes on the date of this Agreement or on the date of the request, as the case may be;

c. All Product Technology disclosed to PPG under Section 3.03 will be the entire technology as it existed on July 15, 1981;

d. All Product Technology disclosed to PPG under Section 3.04 will be the entire technology as actually practiced by Great Lakes on the date of this Agreement or the date of the request, as the case may be; provided, that the technology for [one of the Group B Products] shall be that acquired from Velsicol Chemical Corporation on July 15, 1981, as subsequently improved by Great Lakes, and practiced by it on the date of this Agreement or the date of the request, as the case may be.

VIII.

Confidentiality

8.01 *Reciprocal Obligation.* Each of the parties hereby agrees with the other that it will keep confidential all Product Technology expressly stated to be confidential which is disclosed to it by the other hereunder or observed by it in the performance of the provisions of Article VI, except to the extent that Product Technology (i) is disclosed by PPG to one of its employees (so long as such) disclosure is necessary for the performance of employment duties and so long as such employee is obligated to treat Product Technology so disclosed in the same manner as confidential and proprietary information of PPG, a bona fide architectural or engineering consultant or building contractor performing services for PPG (so long as such disclosure is necessary for the performance of such consulting or contracting duties and then only so long as such consultant or contractor first executes a written agreement corresponding to that made by PPG under this Section 8.01), or a subsidiary of PPG which is permitted to use and practice the Product Technology under the terms of the proviso to Section 4.03, (ii) is or becomes publicly known, (iii) is received by the party from a third person entitled to disclose the same, (iv) is known to the party prior to disclosure, or (v) is required to be disclosed by law or order of a court or other competent government agency. As so limited, the obligations of the parties under this Section 8.01 shall terminate January 1, 1994.

IX.

Other Velsicol Products

9.01 *Disclosure.* Upon request of PPG at any time within two (2) years following the date of this Agreement, and upon payment by PPG to Great Lakes of a fee of Ten Thousand Dollars ($10,000.00), Great Lakes will conduct a one or two day seminar for not more than ten (10) employees and representatives of PPG, at which knowledgeable Great Lakes employees will give a verbal explanation of the technology of all brominated products which it acquired from Velsicol Chemical Corporation in 1981 other than Group A and Group B Products. The seminar will be held in West Lafayette, Indiana. The travel expenses incurred by PPG's employees and representatives will be borne by PPG. Each of PPG's employees and representatives will be required to execute a confidentiality agreement relating to the technology to be disclosed at said seminar.

9.02 *Negotiation for License.* Upon request of PPG at any time within one (1) year following the date of the seminar referred to in Section 9.01, Great Lakes will enter into negotiation of a non-exclusive license to use any part of the technology discussed at said seminar in which PPG has an interest, and will bargain in good faith to arrive at a mutually acceptable license agreement.

X.

General Provisions

10.01 *Maintenance of Records.* PPG shall, and shall cause those assignees and sublicensees permitted hereunder, to maintain accurate and complete records relating to the manufacture and sale of Products using Product Technology. Such records shall be adequate to permit royalties to be readily computed in accordance with Article V. PPG agrees, at the request of Great Lakes, to permit an independent certified public accountant selected by Great Lakes, except one to whom PPG has some reasonable objection, to have access during ordinary business hours to such records as may be necessary (a) to determine in respect to any calendar quarter year, ending not more than two (2) calendar years prior to the date of such request, the correctness of any report or payment made under this Agreement, or (b) to obtain information as to the royalties payable for any such period in case of failure of PPG to report or pay pursuant to the terms of this Agreement. Such accountant shall not disclose to Great Lakes any information relating to the business of PPG, except that which should properly have been contained in any report hereunder.

10.02 *Governing Law.* This Agreement is made in the State of Indiana, and all questions relating to its validity, construction, and enforcement shall be governed by the law of that State.

10.03 *Amendment.* No amendment of, or addition to, this Agreement will be binding upon either party hereto unless it has been reduced to writing and duly executed by both parties.

10.04 *Prohibition Against Assignment.* Prior to the expiration of the Product Technology Conditional License Term for each Product for which Product Technology has been furnished pursuant to Articles II and III, the rights to the Product Technology for each such Product created under this Agreement may not be assigned by PPG except to a single business entity which is one of the following: (a) a domestic U.S. entity in which PPG possesses more than fifty percent (50%) of both the equity and the voting control: or (b) a corporation growing out of or surviving a consolidation or acquisition by or merger with PPG; or (c) a non-U.S. entity in which PPG possesses of both the equity and the voting control the lesser of forty percent (40%) or the maximum permitted by the laws of the foreign jurisdiction; or (d) a successor or purchaser of the entire brominated flame retardant chemicals business of PPG. After the expiration of the

Product Technology Conditional License Term for each Product for which Product Technology has been furnished pursuant to Articles II and III, the rights to the Product Technology for each such Product created under this Agreement may be assigned to any entity that accepts the remaining obligations, if any, to maintain records and pay royalties pursuant to section 10.01 and Article V, respectively.

10.05 *More Favorable Grant.* In the event Great Lakes shall grant another rights and licenses respecting any Product for which PPG has elected under Section 2.03, 3.02, 3.03, or 3.04 to obtain Product Technology under financial terms (including payments and royalties) less than those imposed upon PPG under this Agreement, Great Lakes shall forthwith offer PPG such financial terms with respect to each and every such Product.

10.06 *Waiver.* The waiver, express or implied, by either party of any right hereunder or of any breach by the other party will not be deemed a waiver of any other right or breach, either of a similar or dissimilar nature.

10.07 *Complete Agreement.* This Agreement supersedes all other communications between the parties regarding, and constitutes their sole and exclusive agreement with respect to, the subject matter of this Agreement.

10.08 *Effective Date.* References herein to "the date of this Agreement" and similar references shall be construed for all purposes as references to the effective date of this Agreement. The effective date of this Agreement shall be the date it becomes effective pursuant to the terms of a certain Memorandum Agreement of even date.

MADE on the date first above written.

GREAT LAKES CHEMICAL CORPORATION

by: ______________________________

PPG INDUSTRIES, INC.

by: ______________________________

SCHEDULE A

PRODUCT SPECIFICATIONS

All percentages by weight unless otherwise stated

PH–73

Assay	99.5%	min.
HBr	0.3%	max.
H_2O	0.5%	max.
Melting Point	92°	C
APHA Sol. Color (MeOH)	200	max.
Sol. Color (MeCl)	200	max.
Sol. Color (NaOH)	300	max.
Appearance	Light tan	cream to flake
Dibromophenol	0.5%	max.

FF–680

Appearance	Off-white to light tan
Odor	Characteristic

Br	68.5% min.
NaBr	0.5% max.
H_2O	0.15% max.
Color Gardner "L"	88 min.
Loss on Drying	0.3% max.
Melting Point	223°C min.

PHT4

Appearance	Free flowing light tan powder
APHA color	100 max.
Neutral equiv.	228 min.
Sulphate	0.3% max.
Melting Point	270°C min.
Moisture	0.4% max.

FM-100

Melting Point	185°-195°C
Br	72% min.
Volatiles	1.0% max.
APHA Color	60 max.
Solubility in styrene	5%
Sieve through #60	80% min.
Sieve through #100	45% min.

PHT4-Diol

Acid No.	0.25 max.
APHA Color	Visual pass/fail
H_2O	.20% max.
Hydroxyl No.	200-235
Br	43.2% min.
Viscosity	80-100 Cps (target)
Diethylene glycol	8.5% max. (target)

PO-64P

Volatiles	1.0% max.
Br	63%-65.5%
NaBr	.15% max.
Melting Range	210°-240°C
Tribromophenol	.15% max.
Alkalinity	.01 m.eq.

ATTACHMENT B

PPG - GREAT LAKES

Third Supplemental Agreement

Made the 16th day of September, 1983, between PPG INDUSTRIES, INC., a Pennsylvania corporation ("PPG"); and GREAT LAKES CHEMICAL CORPORATION, a Delaware corporation ("Great Lakes").

Whereas, PPG is the successor by merger to Houston Chemical Corporation, a Texas corporation ("Houston"); and Great Lakes is the successor by merger to Great Lakes Chemical Corporation, a Michigan corporation ("Great Lakes - Michigan"); and as such successors PPG and Great Lakes are seized, possessed, and entitled to all the rights, titles, benefits, and interests, and are bound by and limited to the obligations, limitations, and covenants, of Houston and Great Lakes - Michigan, respectively, in the following listed written contracts, viz:

A. Uncaptioned, dated July 19, 1960, between Houston and Great Lakes - Michigan;

B. Houston - Great Lakes Supplemental Agreement, dated July 28, 1964, between Houston and Great Lakes - Michigan;

C. Houston - Great Lakes Second Supplemental Agreement, dated March 21, 1968, between Houston and Great Lakes - Michigan;

D. Arkansas - Great Lakes Bromine Sales Agreement, dated July 31, 1964, between Arkansas Chemicals, Inc. (hereinafter "ACI") and Great Lakes - Michigan.

E. Arkansas - Houston Bromine Sales Agreement, dated July 31, 1964, between ACI and Houston;

F. Amendment and Extension of Arkansas - Great Lakes Bromine Sales agreement, dated March 21, 1968, between ACI and Great Lakes - Michigan; and

G. Amendment and Extension of Arkansas - Houston Bromine Sales Agreement, dated March 21, 1968, between ACI and Houston; and

Whereas, PPG and Great Lakes wish to further amend and change the said contracts between themselves and with ACI in certain particulars;

Now, therefore, in consideration of the premises and of the covenants set forth below the parties do covenant and agree as follows:

1. Effective as of the date of this Third Supplemental Agreement, the parties hereby amend the prior agreements between them as follows:

a. From the first sentence of Section 2 of the uncaptioned agreement of July 19, 1960 (item A above) the last fifteen (15) words are deleted.

b. The words "and the identity of the proposed purchaser" shall be inserted immediately following the words "including the number of shares involved" in the first sentence of paragraph (c) of section 8 of the said agreement of July 19, 1960 (item A above).

c. The words "and with the proposed purchaser" shall be inserted immediately after the word "shares" and before the word "set" in the second sentence of paragraph (c) of section 8 of the said agreement of July 19, 1960 (item A above).

d. Section 2 of the Supplemental Agreement of July 28, 1964 (item B above) is deleted in its entirety.

e. Section 2 of the Second Supplemental Agreement of March 21, 1968 (item C above) is deleted in its entirety.

2. Great Lakes will sign and deliver to ACI, and the parties will cause ACI to sign and deliver to Great Lakes, an agreement in the words and form attached hereto as Appendix 1.

3. PPG will sign and deliver to ACI, and the parties will cause ACI to sign and deliver to PPG, an agreement in the words and form attached hereto as Appendix 2.

4. To the extent that from facilities in place at ACI's plant on the date of this Third Supplemental Agreement, in the condition in which they then are or may be put without capital expenditures, and from facilities installed or improved by capital expenditures funded by contributions from the parties hereto, proportionate to the then relative equity interest in ACI of each of the parties hereto, up to an actual bromine production capacity of [the approximate nameplate capacity in pounds] per annum of mutually funded capacity, the bromine produced by ACI shall be allocated to Great Lakes and PPG pursuant to the provisions of the Bromine Sales Agreements between ACI and Great Lakes, and ACI and PPG, in the forms attached hereto, respectively, as Appendices 1 and 2. With respect to all mutually funded expansion of ACI's actual

bromine production capacity above [the approximate nameplate capacity in pounds] of mutually funded capacity, each party shall in each calendar year have a call upon and right to the said excess (above [the approximate nameplate capacity in pounds]) proportioned to its relative equity interest in ACI; provided, however, the foregoing shall not include or cover any actual bromine production capacity resulting from facilities installed or improved by capital expenditures funded after the execution of this Third Supplemental Agreement by contributions from only one of the parties hereto under Section 5 hereof. All of the additional bromine resulting from a unilaterally funded expansion in ACI's actual bromine production capacity will be made available to and for the sole contributing party, unless otherwise mutually agreed to in writing by such contributing party and ACI, notwithstanding any provision herewith contained in the aforementioned ACI agreements with Great Lakes and PPG. The parties will cause the said agreements to be administered (and if necessary, amended when appropriate) to give full effect to the intentions of the parties in this Section 4.

5. (a) If, in order to maintain or increase the actual bromine production ability of ACI, a party wishes ACI to make a capital expenditure for the improvement of existing facilities or for the construction or other acquisition of additional facilities; but the other party (upon written request from the first) does not in writing agree within 20 business days with respect to a total funding of $125,000 or less, or within 30 business days with respect to a total of $500,000 or less, or within 50 business days with respect to all other fundings to contribute a share, proportionate to its then relative equity interest, of the capital contributions necessary to fund such improvements, construction, or acquisition; then the instigating party may make the necessary or appropriate capital contribution to ACI, and the declining party shall as a shareholder cooperate with the instigating party in taking such actions and in causing ACI directors to take such action as may be appropriate to have the improvements, constructions, or acquisitions so funded to be made and done. Upon the making of such capital contributions, the equity interest of the contributing party shall be increased by the issuance to the contributing party of additional shares of the contributing party's class of stock of ACI reflective of the amount of contribution, the amount of such additional stock to be issued ("Later Shares") being equal to C × TS ÷ SE, wherein C means the amount of the contribution, SE means the aggregate shareholder equity (the difference between total assets and total liabilities) in ACI as of the date of contribution excluding consideration of the subject contribution, and TS means the total shares of ACI authorized and issued as of the date of contribution. The following hypothesis will illustrate the intended application of this section:

(b) If any asset purchased by a capital contribution for which Later Shares were issued is destroyed or otherwise damaged so as to be rendered useless and such asset is not subsequently replaced or repaired, any insurance proceeds obtained therefor as well as any salvage value of such asset shall be applied by ACI to the repurchase by ACI of Later Shares which were issued for such asset. The number of Later Shares to be so repurchased shall be determined based upon the value which had been originally computed pursuant to subsection 5(a) above for each Later Share pertaining to such asset. The parties hereto as shareholders of ACI shall take such actions to cause ACI directors to take such actions as may be required and appropriate to repurchase such Later Shares.

6. (a) If at any time prior to the ninth (9th) anniversary of the date hereof, a notice is given by PPG to Great Lakes pursuant to Section 8(c) of the uncaptioned agreement of July 19, 1960 between Houston Chemical Corporation, a Texas corporation, and Great Lakes Chemical Corporation, a Michigan corporation, Great Lakes may elect either to exercise its rights of first refusal as stated in said section 8(c) or to purchase the shares referred to in such notice at a price computed in accordance with subsection 6(b) below; provided, that Great Lakes right and PPG's obligation to consummate such

a purchase because of such an election shall be subject to and conditioned upon Great Lakes obtaining within the time specified in Section 6(c) below Federal Trade Commission approval for the acquisition.

(b)(i) It shall conclusively be deemed that the first five thousand shares of ACI capital stock transferred by PPG, whether to Great Lakes or a third party, are those five thousand shares owned by PPG at the time of the execution of this Agreement. These shares are hereinafter referred to as "Original Shares". All shares transferred by PPG after it has transferred five thousand shares shall be conclusively deemed not to be Original Shares; and they are hereinafter referred to as "Later Shares". The total purchase price paid by Great Lakes for shares transferred to it shall be the sum of two increments; the first increment being the total incremental price for all transferred Original Shares (if any) and the second increment being the total incremental price for all transferred Later Shares (if any).

(ii) The incremental price for each Original Share shall be equal to [a value based upon a negotiated formula.]

(iii) The incremental price of each Later Share shall be equal to [a value based upon a negotiated formula.]

(c) The parties understand that, pursuant to the 10 year ban provision contained in the Consent Order in FTC Docket 9155, any purchase of PPG's interest in ACI by Great Lakes within ten years of the final Commission order must first be approved by the Federal Trade Commission, and that the Federal Trade Commission has not, by incorporating this Agreement in its Consent Order, either expressly or implicitly approved or indicated that it would approve any such transaction. The parties therefore agree that the closing of any proposed sale of PPG's interest in ACI to Great Lakes shall be deferred as long as required (but not more than 135 days) to obtain such Federal Trade Commission or any other necessary governmental approval. If the Federal Trade Commission disapproves the proposed sale of PPG's interest in ACI to Great Lakes or if the Federal Trade Commission or other necessary approval cannot be obtained within 135 days, then for a period of one (1) year from the date of the Federal Trade Commission disapproval or the expiration of the 135 day period, whichever is earlier, it shall be conclusively deemed that Great Lakes has waived all rights under said Section 8(c) and this Section 6 and that PPG shall be free to sell its interest in ACI to any party. Despite the expiration of a one year waiver with respect to any proposed sale, the provisions of this Section 6 shall remain in effect with respect to a possible future sale of PPG's interest in ACI.

(d) All rights and obligations of PPG as a shareholder in ACI, including but not limited to all obligations assumed on behalf of ACI as a guarantor, shall terminate upon the closing if as a result of the closing PPG owns no more ACI stock. If necessary to give effect to the termination of such obligations, Great Lakes shall assume any obligation undertaken with the prior knowledge and approval of Great Lakes.

7. The uncaptioned agreement of July 19, 1960, the Supplemental Agreement, the Second Supplemental Agreement (the foregoing being items A, B, and C above) and this Third Supplemental Agreement shall hereafter be construed and enforced according to the laws of the State of Arkansas.

8. References herein to "the date of this Agreement" and similar references shall be construed as references to the effective date of this Agreement. The effective date of this Agreement shall be the date it becomes effective pursuant to the terms of a certain Memorandum Agreement of even date.

PPG INDUSTRIES, INC.

By ______________________________

GREAT LAKES CHEMICAL CORPORATION

By ______________________________

APPENDIX 1

to

ATTACHMENT B

BROMINE SALES AGREEMENT

between

GREAT LAKES CHEMICAL CORPORATION

and

ARKANSAS CHEMICALS, INC.

Made the 16th day of September 1983, by and between ARKANSAS CHEMICALS, INC., a Delaware corporation, herein called Seller; and GREAT LAKES CHEMICAL CORPORATION, a Delaware corporation, herein called Buyer.

1. That certain contract dated July 31, 1964, between Arkansas Chemicals, Inc. and Great Lakes Chemical Corporation (a Michigan corporation) captioned *Arkansas - Great Lakes Bromine Sales Agreement* and that certain contract dated March 21, 1968, between the same parties, captioned *Amendment and Extension of Arkansas - Great Lakes Bromine Sales Agreement* are hereby terminated, and shall have no force, effect, or application to sales of bromine not delivered prior to the date of this Agreement.

2. This Agreement shall continue until December 31, 1993, and continue thereafter unless and until terminated by either party by not less than 24 full calendar months prior written notice of termination given by either party to the other, provided, however, such notice of termination may not be given prior to December 31, 1991.

3. (a) Except as it may be limited by its ability to produce bromine and by its commitment to sell bromine to PPG Industries, Inc. ("PPG"), Seller will sell and deliver to Buyer all bromine ordered from it by Buyer. Buyer will purchase, accept, and pay for not less than [an economical amount] of bromine in each calendar year (or, in the first and last partial calendar years of this Agreement, the proportionate fraction of such quantity) for the price and upon the terms and conditions herein set forth; provided, that Buyer's obligation to purchase in any one year shall be reduced to the extent that in the same year Seller sells bromine to another customer other than PPG.

(b) For the limited purchase of application of the rights set forth in this subsection 3(b) and not for the purposes of pricing bromine to be sold under this Agreement, Seller shall during each December and June during the term hereof calculate a *pro forma* price per pound of bromine (i) based on a projected maximum operating capacity of Seller for the next twelve (12) months, and (ii) which would yield for such twelve (12) months a pretax return [at a negotiated rate sufficient to provide bromine at an economical cost.] The parties agree that for the first twelve (12) months of this Agreement Seller's maximum operating capacity shall be conclusively presumed to be not less than [an economical amount] annually. If the *pro forma* price per pound so calculated by Seller is greater than Buyer's volume weighted average price for bromine sold in bulk by Buyer F.O.B. El Dorado, Arkansas during the preceding two (2) calendar months. Buyer shall have the right exerciseable by written notice to Seller within the thirty (30) days after the calculated *pro forma* price has been communicated to Buyer to terminate its purchase obligations under this Agreement effective the date of Buyer's notice. In calculating Buyer's volume weighted average price, sales by Buyer to any of its subsidiaries and sales by Buyer to any other party for which part of the consideration is a return of a by-product generated by the use of the bromine so sold shall be disregarded. Buyer agrees that in its capacity as manager of Seller it will not commit an act or omission designed or calculated to lower the operating capacity of Seller for the purpose of bringing into effect the provisions of this subsection 3(b). In the event Buyer elects to terminate its purchase obligations under this Agreement pursuant to its rights under this subsection 3(b), Buyer will promptly initiate and take such action and cause its directors on Seller's Board to take such action to accomplish the liquidation and dissolution of Seller as soon as possible after the termination of Buyer's purchase obligation under this Agreement. It is understood and agreed by Buyer that if it can, but does not, exercise its right to terminate its purchase obligations under this Agreement as provided for in this subsection 3(b), Buyer shall remain obligated thereafter to purchase the quantities required under this Agreement, unless and until it may exercise a subsequent right of termination under this subsection 3(b).

(c) If PPG properly files a valid petition with the Court of Chancery of Delaware pursuant to section 273 of the Delaware Corporation Law, and if at the time of filing Buyer is in breach of its obligation under subsection 3(a) above, or if Buyer has failed in any period of six (6) consecutive months to purchase one half of its annual obligation under section 3(a) pertinent to those months and has not cured that default within sixty (60) days after PPG by written notice calls upon Buyer to cure the default, then Buyer shall and does hereby waive the periods of three (3) months and one year referred to in subsection (b) of said section 273, and shall and does hereby consent that proceedings of dissolution may go forward as if such periods had expired.

4. Seller shall ship the bromine in liquid form by tank truck or tank car as specified by Buyer from time to time; and Seller shall deliver the bromine to Buyer's continental U.S. plants or to Buyer's customers at places in the continental U.S. designated by Buyer from time to time. Freight will be charged to Buyer's account. Buyer will aid and facilitate unloading of the bromine promptly upon its arrival at the plant of Buyer or its designated customer. If in any month during the term hereof Seller's tank car and tank truck fleet is not sufficient to deliver the combined quantities of bromine ordered by Buyer and PPG for delivery in that month, and Seller is unable to lease sufficient additional equipment, Seller shall allocate the fleet capacity in such a way as to endeavor to make deliveries of the quantities ordered by Buyer and PPG, respectively, in a ratio which is the greater of: ONE - the ratio of deliveried to them in the next preceding 12 calendar months; or TWO - [a negotiated ratio.]

5. For each sale of bromine hereunder Seller shall invoice a preliminary net price per pound F.O.B. Seller's plant equal to Seller's best estimate for the then current calendar year of the price necessary to yield for that year a pretax return [at a negotiated rate sufficient to provide bromine at an economical cost] during such year. As soon as practicable after the end of the calendar year Seller shall calculate the net price per pound it should have charged for all bromine sold to Buyer and PPG in that year in order to achieve the said pretax return; and will either refund the excess charges to Buyer if the calculated price is less than the actual charges, or invoice Buyer for the appropriate additional amount, if the calculated price is greater than the actual charges. Buyer will pay all invoices within 30 days of the date thereof.

6. Not later than October of each year Buyer shall give Seller in writing Buyer's best estimate of the total quantity of bromine Buyer will require in the ensuing calendar year. Not later than the 15th day of every calendar month, Buyer shall give Seller in writing Buyer's best estimate of its requirements in each of the ensuing three calendar months. While it will attempt to accept and fill all Buyer's orders, in no calendar month shall Seller be obligated to sell and deliver a quantity greater than the lesser of (i) 110% of the latest estimate for that month, or (ii) [a specified amount of bromine.]

7. If in any month during the term hereof the quantity of bromine which Seller has available out of production at Seller's plant for delivery to customers is less than the combined quantities that Buyer and PPG require to be delivered to them during such

month pursuant to this contract and a contract of even date herewith between Seller and PPG, Seller shall pro rate deliveries of the quantity so available between Buyer and PPG in a ratio which is the greater of: ONE - the ratio of delivered to them in the preceding 12 calendar months; or TWO - [a negotiated ratio.] To the extent that the bromine delivered by Seller in any one month to Buyer or for its account is less than Buyer's orders for that month, Buyer's purchase obligations under section 3 shall be reduced by the same amount.

8. The bromine sold and delivered by Seller to Buyer hereunder shall conform to the following specifications and standards of quality:

[Product Specification]

9. This Agreement may not be assigned except to (i) a business entity in which Buyer possesses more than fifty percent (50%) of both the equity and of the voting control, or (ii) to a corporation growing out of or surviving a consolidation or acquisition by or merger with Buyer, or (iii) to the purchaser of all Buyer's shares of the capital stock of Seller.

10. Seller shall warrant only that the bromine delivered to Buyer hereunder shall comply with specifications expressed in this contract. SELLER MAKES NO OTHER WARRANTIES; AND DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR THE INTENDED PURPOSE. Any claim relating to quantity, quality, weight, condition, loss or damage, of or to the bromine shipped hereunder, shall be conclusively deemed waived unless made within fifteen (15) business days after the arrival of the shipment at its intended destination. If Buyer rejects all or a part of a shipment hereunder, Seller shall have the right to cure any claimed defects by delivering conforming bromine within a reasonable time.

11. Nothing herein contained shall obligate Seller to increase its bromine production capacity nor to make any capital expenditures to maintain existing production capacity; and so long as Seller complies with the allocation provisions of section 7 hereof, a failure of Seller to deliver bromine which it would otherwise be obligated to deliver hereunder shall not be deemed a violation of this Agreement provided such failure results at least in part from limitations in Seller's ability to produce bromine. Seller's failure or inability to make, or Buyer's failure or inability to take, any delivery or deliveries when due, or the failure or inability of either party to effect timely performance of any other obligation required of it hereunder, if caused by force majeure as hereinafter defined, shall not constitute a default hereunder or subject the party affected by force majeure to any liability to the other; provided, however, the party so affected shall promptly notify the other of the existence thereof and of its expected duration and the estimated effect thereof upon its ability to perform its obligations hereunder. Such party shall promptly notify the other party when such force majeure circumstance has ceased to affect its ability to perform its obligations hereunder. The quantity to be delivered hereunder shall be reduced to the extent of the deliveries omitted for such cause or causes, unless both parties agree that the total quantity to be delivered hereunder shall remain unchanged. During the time that Seller is unable to make deliveries or otherwise perform, it shall not be obligated to procure, or to use its best efforts to procure, any quantity of product sold hereunder from any alternate producer or supplier. As used herein, the term "force majeure" shall mean and include any act of God, nature, or the public enemy, accident, explosion, operation malfunction or interruption, fire, storm, earthquake, flood, drought, perils of the sea, strikes, lockouts, labor disputes, riots, sabotage, embargo, war (whether or not declared and whether or not the United States is a participant), Federal, State, or Municipal legal restriction or limitation or compliance therewith, failure or delay of transportation, shortage of or inability to obtain raw materials, supplies, equipment, fuel, power, labor,

or other operational necessity, interruption or curtailment of power supply, or any other circumstance of a similar or different nature beyond the reasonable control of the party affected thereby including the loss, lack, failure, or damage to any of Buyer's plant, equipment or facilities. In this connection a party shall not be required to resolve labor disputes or disputes with suppliers of raw materials, supplies, equipment, fuel, or power, except in accordance with such party's business judgment as to its best interest.

12. Except in respect of Section 3(c) hereof, as used in this Agreement references to "PPG" shall mean the "Buyer" under Seller's Bromine Sales Agreement of even date with PPG Industries, Inc. This Agreement shall be construed and enforced in accordance with the law of Arkansas.

13. References herein to "the date of this Agreement" and similar references shall be construed as references to the effective date of this Agreement. The effective date of this Agreement shall be the date it becomes effective pursuant to the terms of a certain Memorandum Agreement of even date.

ARKANSAS CHEMICALS, INC. GREAT LAKES CHEMICAL CORPORATION

by ______________ by ______________

APPENDIX 2

to

ATTACHMENT B

BROMINE SALES AGREEMENT

between

PPG INDUSTRIES, INC.

and

ARKANSAS CHEMICALS, INC.

Made the 16th day of September 1983, by and between ARKANSAS CHEMICALS, INC., a Delaware corporation, herein called Seller; and PPG INDUSTRIES, INC., a Pennsylvania corporation, herein called Buyer.

1. That certain contract dated July 31, 1964, between Arkansas Chemicals, Inc., and Houston Chemical Corporation (a Texas corporation) captioned *Arkansas - Houston Bromine Sales Agreement* and that certain contract dated March 21, 1968, between the same parties, captioned *Amendment and Extension of Arkansas - Houston Bromine Sales Agreement* are hereby terminated, and shall have no force, effect, or application to sales of bromine not delivered prior to the date of this Agreement.

2. This Agreement shall continue until December 31, 1993, and continue thereafter unless and until terminated by either party by not less than 24 full calendar months prior written notice of termination given by either party to the other, provided, however, such notice of termination may not be given prior to December 31, 1991; provided, further, that Buyer's purchase obligations hereunder shall terminate forthwith upon termination of the purchase obligations of Great Lakes Chemical Corporation under its Bromine Sales Agreement with Seller of even date pursuant to subsection 3(b) of that Agreement. Buyer agrees to take action and cause its directors on Seller's Board to take action to cooperate with and join in the liquidation and dissolution of Seller referred to in said subsection 3(b) of said Bromine Sales Agreement between Seller and Great Lakes Chemical Corporation.

3. Seller will sell and deliver and Buyer will purchase, accept, and pay for all Buyer's requirements of bromine up to but not in excess of [a specified amount] of bromine in each calendar year (or, in the first and last partial calendar years of this Agreement, the proportionate fraction of such quantity) for the price and upon the terms and conditions herein set forth.

4. Seller shall ship the bromine in liquid form by tank truck or tank car as specified by Buyer from time to time; and Seller shall deliver the bromine to Buyer's continental U.S. plants or to Buyer's customers at places in the continental U.S. designated by Buyer from time to time. Freight will be charged to Buyer's account. Buyer will aid and facilitate unloading of the bromine promptly upon its arrival at the plant of Buyer or its designated customer. If in any month during the term hereof Seller's tank car and tank truck fleet is not sufficient to deliver the combined quantities of bromine ordered by Great Lakes Chemical Corporation ("Great Lakes") and Buyer for delivery in that month, and Seller is unable to lease sufficient additional equipment, Seller shall allocate the fleet capacity in such a way as to endeavor to make deliveries of the quantities ordered by Great Lakes and Buyer, respectively, in a ratio which is the greater of: ONE - the ratio of deliveries to them in the next preceding 12 calendar months; or TWO - [a negotiated ratio.]

5. For each sale of bromine hereunder Seller shall invoice a preliminary net price per pound F.O.B. Seller's plant equal to Seller's best estimate for the then current calendar year of the price necessary to yield for that year a pretax return [at a negotiated rate sufficient to provide bromine at an economical cost] during such year. As soon as practicable after the end of the calendar year Seller shall calculate the net price per pound it should have charged for all bromine sold to Buyer and Great Lakes in that year in order to achieve the said pretax return; and will either refund the excess charges to Buyer if the calculated price is less than the actual charges, or invoice Buyer for the appropriate additional amount, if the calculated price is greater than the actual charges. Buyer will pay all invoices within 30 days of the date thereof.

6. Not later than October of each year, Buyer shall give Seller in writing Buyer's best estimate of the total quantity of bromine Buyer will require in the ensuing calendar year. Not later than the 15th day of every calendar month, Buyer shall give Seller in writing Buyer's best estimate of its requirements in each of the ensuing three calendar months. While it will attempt to accept and fill all Buyer's orders, in no calendar month shall Seller be obligated to sell and deliver a quantity greater than the lesser of (a) 100% of the latest estimate for that month or (b) [a specified amount of bromine.]

7. If in any month during the term hereof the quantity of bromine which Seller has available out of production at Seller's plant for delivery to customers is less than the combined quantities that Great Lakes and Buyer require to be delivered to them during such month pursuant to this contract and a contract of even date herewith between Seller and Great Lakes, Seller shall prorate deliveries of the quantity so available between Great Lakes and Buyer in a ratio which is the greater of: ONE - the ratio of deliveries to them in the next preceding 12 calendar months; or TWO - [a negotiated ratio.]

8. The bromine sold and delivered by Seller to Buyer hereunder shall conform to the following specifications and standards of quality:

[Product Specification]

9. This Agreement may not be assigned except to (i) a business entity in which Buyer possesses more than fifty percent (50%) of both the equity and of the voting control, or (ii) to a corporation growing out of or surviving a consolidation or acquisition by or merger with Buyer, or (iii) to the purchaser of all Buyer's shares of the capital stock of Seller.

10. Seller shall warrant only that the bromine delivered to Buyer hereunder shall

comply with specifications expressed in this contract. SELLER MAKES NO OTHER WARRANTIES; AND DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR THE INTENDED PURPOSE. Any claim relating to quantity, quality, weight, condition, loss, or damage, of or to the bromine shipped hereunder, shall be conclusively deemed waived unless made within fifteen (15) business days after the arrival of the shipment at its intended destination. If Buyer rejects all or a part of a shipment hereunder. Seller shall have the right to cure any claimed defects by delivering conforming bromine within a reasonable time.

11. Nothing herein contained shall obligate Seller to increase its bromine production capacity nor to make any capital expenditures to maintain existing production capacity; and so long as Seller complies with the allocation provisions of Section 7 hereof, a failure of Seller to deliver bromine which it would otherwise be obligated to deliver hereunder shall not be deemed a violation of this Agreement provided such failure results at least in part from limitations in Seller's ability to produce bromine. Seller's failure or inability to make, or Buyer's failure or inability to take, any delivery or deliveries when due, or the failure or inability of either party to effect timely performance of any other obligation required of it hereunder, if caused by "force majeure" as hereinafter defined, shall not constitute a default hereunder or subject the party affected by force majeure to any liability to the other; provided, however, the party so affected shall promptly notify the other of the existence thereof and of its expected duration and the estimated effect thereof upon its ability to perform its obligations hereunder. Such party shall promptly notify the other party when such force majeure circumstance has ceased to affect its ability to perform its obligations hereunder. The quantity to be delivered hereunder shall be reduced to the extent of the deliveries omitted for such cause or causes, unless both parties agree that the total quantity to be delivered hereunder shall remain unchanged. During the time that Seller is unable to make deliveries or otherwise perform, it shall not be obligated to procure, or to use its best efforts to procure, any quantity of product sold hereunder from any alternate producer or supplier. As used herein, the term "force majeure" shall mean and include any act of God, nature or the public enemy, accident, explosion, operation malfunction or interruption, fire, storm, earthquake, flood, drought, perils of the sea, strikes, lockouts, labor disputes, riots, sabotage, embargo, war (whether or not declared and whether or not the United States is a participant), Federal, State or Municipal legal restriction or limitation or compliance therewith, failure or delay of transportation, shortage of, or inability to obtain raw materials, supplies, equipment, fuel, power, labor, or other operational necessity, interruption or curtailment of power supply, or any other circumstance of a similar or different nature beyond the reasonable control of the party affected thereby including the loss, lack, failure, or damage of any of Buyer's plant, equipment or facilities. In this connection a party shall not be required to resolve labor disputes or disputes with suppliers of raw materials, supplies, equipment, fuel, or power, except in accordance with such party's business judgment as to its best interest.

12. As used in this Agreement references to "Great Lakes" shall mean the "Buyer" under Seller's Bromine Sales Agreement of even date with Great Lakes Chemical Corporation. This Agreement shall be construed and enforced in accordance with the law of Arkansas.

13. References herein to "the date of this Agreement" and similar references shall be construed as references to the effective date of this Agreement. The effective date of this Agreement shall be the date it becomes effective pursuant to the terms of a certain Memorandum Agreement of even date.

ARKANSAS CHEMICALS, INC.

By ______________________

PPG INDUSTRIES, INC.

By ______________________

AMENDED MEMORANDUM AGREEMENT

Amended Memorandum Agreement made this February 1, 1984, between GREAT LAKES CHEMICAL CORPORATION and PPG INDUSTRIES, INC.

Recitals

A. Great Lakes Chemical Corporation ("Great Lakes") is one of the respondents in an Administrative Complaint being prosecuted by the Federal Trade Commission staff before an Administrative Law Judge employed by the Commission. In that proceeding, the Commission Staff is contesting the legality of Great Lakes' acquisition of certain assets from Velsicol Chemical Corporation on July 15, 1981.

B. Great Lakes and the Commission staff have had, and will in all likelihood continue to have, discussions looking to a voluntary settlement of the Administrative Complaint.

C. Great Lakes and PPG Industries, Inc. ("PPG") have entered into the following agreements, each of which is legally binding on the parties on the date on which they are signed by Great Lakes and PPG and each of which is dated the date hereof. They are collectively referred to herein as the "Agreements":

i. A production technology disclosure and licensing Agreement (Attachment A to the proposed Consent Order in the above referenced proceeding);

ii. A Third Supplemental Agreement between Great Lakes and PPG with respect to the operation of Arkansas Chemicals, Inc., being Attachment B to said proposed Consent Order (which includes a Bromine Sales Agreement between Great Lakes and Arkansas Chemicals, Inc. as Appendix 1 and a Bromine Sales Agreement between PPG and Arkansas Chemicals, Inc., as Appendix 2).

D. The Agreements, and the transactions contemplated thereby, constitute an element in the settlement which Great Lakes will propose to the Commission staff.

E. The parties hereto entered into a Memorandum Agreement on September 16, 1983, which they desire to amend by this Amended Memorandum Agreement, said amendments relating only to the term of this Amended Memorandum Agreement.

It is therefore agreed:

1. In the event that, on or before [a specified date] the Federal Trade Commission shall have issued final approval under Section 3.25(f) of the Commission's Rules of Practice to the proposed settlement of the Administrative Complaint presently pending against Great Lakes before the Commission, without requiring a hearing or trial thereof, of which proposed settlement the Agreements are a part, the said Agreements shall become effective as of the date of such approval, and the parties shall proceed to perform their respective obligations thereunder.

2. In the event that the Federal Trade Commission shall not have issued said final approval on or before [a specified date] each of the Agreements shall be null and void *ab initio*.

3. Great Lakes shall forthwith notify PPG in writing of the Commission's acceptance or rejection of the proposed settlement.

4. Until the earlier of a [specified date] or the approval or rejection by the Federal Trade Commission of the proposed settlement, neither Great Lakes nor PPG shall take any action which would substantially interfere with or render impossible its ability to

perform the obligations to be performed by it under the Agreements.

GREAT LAKES CHEMICAL CORPORATION

by ______________________________

PPG INDUSTRIES, INC.

by ______________________________

IN THE MATTER OF

GREAT LAKES CHEMICAL CORPORATION, ET AL.

DISMISSAL ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9155. Complaint June 23, 1981—Decision and Order May 23, 1984.*

The Federal Trade Commission has dismissed the proceedings against Northwest Industries, Inc. and Velsicol Chemical Corp.

Appearances

For the Commission: *John V. Lacci.*

For the respondent: *William Fifield, Christian L. Campbell, Sidley & Austin,* Chicago, Ill. and *William G. Schaefer, Jr., Sidley & Austin,* Washington, D.C. for Northwest, Industries, Inc. and Velsicol Chemical Corporation.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondents, Great Lakes Chemical Corporation, Northwest Industries, Inc., and Velsicol Chemical Corporation, with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondents Northwest Industries, Inc. and Velsicol Chemical Corporation ("respondents"), their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreements is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

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* Complaint previously published at 103 F.T.C. 467.

1. Respondent Northwest Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6300 Sears Tower, in the City of Chicago, State of Illinois.

2. Respondent Velsicol Chemical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 341 East Ohio Street, in the City of Chicago, State of Illinois.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That all proceedings in Docket No. 9155 against Northwest Industries, Inc. and Velsicol Chemical Corporation shall be dismissed.

IN THE MATTER OF

KAISER ALUMINUM & CHEMICAL CORPORATION

Docket 9080. Interlocutory Order, May 25, 1984

ORDER GRANTING EXTENSION OF *IN CAMERA* TREATMENT

Various exhibits in this proceeding have been subject to *in camera* treatment, pursuant to order of Administrative Law Judge James P. Timony. This order has now expired.

Third parties to this proceeding, Basic Incorporated ("Basic"), and J. E. Baker Company and Dolomite Brick Corporation ("Baker"), have requested a continuation of *in camera* treatment, by motions dated October 13, 1981 and October 15, 1981, respectively.

In Commission proceedings, requests for *in camera* treatment must show

> that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. The showing may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves.[1]

That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to [the applicant's] business that disclosure would result in serious competitive injury," and then balancing that factor against "the importance of the information in explaining the rationale of [Commission] decisions."[2]

The Commission agrees that an extension of *in camera* treatment for these documents is justified. These are documents detailing sales of specific lines of refractories and related products, data regarded as extremely sensitive by both firms. Even though the statistics in question are over five years old, the companies argue a serious injury would be done them by release of this information, which they have never made available to the public.

The countervailing interest in public disclosure of the information does not outweigh the likelihood of serious competitive injury. A public understanding of this proceeding does not depend on access to these data submitted by these third party firms. Moreover, as third parties, the requests of these companies deserve special solicitude. As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.

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[1] *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *see* 16 C.F.R. 3.45(b) 1983).

[2] *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *see Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977).

For the reasons stated above and in the referenced motions, the Commission will extend *in camera* treatment to documents submitted by these third parties, until December 31, 1985. This extension applies to CX 139E and 139H, and RX 499D and 499H.

In the Matter of

KAISER ALUMINUM & CHEMICAL CORPORATION

Docket 9080. Interlocutory Order, May 25, 1984

ORDER DEFINING THE SCOPE OF PROCEEDINGS ON REMAND

The Commission issued its complaint in this matter on April 27, 1976, alleging that Kaiser's February 28, 1974, acquisition of the Lavino Division of International Minerals and Chemicals Corporation was in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45. An Initial Decision concluding that a violation had occurred issued October 12, 1978, and, on May 17, 1979, the Commission issued its Opinion and Order affirming a violation and ordering divestiture of the acquired assets.

In *Kaiser Aluminum & Chemical Corp.* v. *FTC*, 652 F.2d 1324 (7th Cir. 1981), the United States Court of Appeals for the Seventh Circuit vacated and set aside the Commission's order and remanded the case to the Commission for further proceedings consistent with the Court's main conclusion that the Commission had improperly applied the doctrine of *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974) to the facts of this case.

On December 21, 1981, the Commission directed the parties to file briefs as to what factual and legal issues should be determined and what further proceedings, if any, would be appropriate, following the remand of this matter to the Commission for further proceedings consistent with the Court of Appeals' opinion.[1]

Complaint counsel take the position that only one issue need be addressed by the Commission on remand: whether upon the application of the legal principles of *United States* v. *General Dynamics Corp.*, supra, as interpreted by the Court of Appeals, the acquisition in question may substantially lessen competition in the relevant markets sustained upon judicial review. Complaint counsel argue that this single issue can be decided without reopening the record, and that the only further proceeding required is briefing of this issue.

Respondent Kaiser agrees that the principal issue on remand is whether, under the rule of *General Dynamics*, complaint counsel met their burden of proving that the acquisition may substantially lessen competition in the relevant markets. Kaiser believes that the complaint should be dismissed now without further briefing. However, in the event that such a dismissal is regarded by the Commission as inappropriate, Kaiser argues that certain additional issues should be addressed, and that the Commission should receive limited evidence, in the form of stipulation or affidavit, about industry developments subsequent to the closing of the record in 1978.

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[1] Briefs were filed by Kaiser Aluminum & Chemical Corporation ("Kaiser") and complaint counsel on February 12, 1982. Answering briefs by both parties were filed March 19, 1982. Kaiser moved to file a reply brief on March 26, 1982, and complaint counsel filed an opposition to this motion on April 7, 1982.

The Commission agrees that the principal issue to be determined on remand is whether, under the principles of *General Dynamics*, the acquisition may substantially lessen competition in the relevant markets sustained by the Court of Appeals. Specifically, the issue is whether statistics establishing a *prima facie* case of violation based upon past market shares can be rebutted by other evidence casting doubt on the ability of the statistics accurately to predict future anticompetitive consequences. Among the factors to which such evidence might pertain are ease of entry into the market, the trend of the market either toward or away from concentration, and the extent of active price competition.[2] The Commission agrees with Kaiser that, given the time elapsed since the acquisition was consummated in 1974 and the closing of the record in 1978, it would be in the public interest to permit the parties to supplement the record with limited evidence concerning industry developments since the closing of the record, insofar as those developments pertain to the nonstatistical factors identified in *General Dynamics*. The evidence is to be submitted on an expedited schedule and in the form of stipulations and affidavits.[3] *See United States* v. *General Dynamics Corp.*, 415 U.S. 486, 504–06 (1974); *United States* v. *E.I. duPont deNemours & Co.*, 353 U.S. 586, 597–598 (1957).[4]

Kaiser argues that, in addition to the *General Dynamics* issue, the Commission should also consider: (1) whether complaint counsel's market shares established a *prima facie* case of violation in the markets sustained by the Court of Appeals; (2) whether the acquisition resulted in efficiencies and other benefits that made it on balance pro-competitive; and (3) whether ordering divestiture would offer a reasonable prospect of significantly increasing competition in the industry and be in the public interest. In this regard, the Commission has a particular concern regarding the effect on all the issues in this proceeding of the reported termination of production, on August 31, 1982, of refractory brick at the Plymouth Meeting, Pennsylvania, and on suspension of operations at Gary, Indiana, at the end of 1983.[5] Further, Kaiser has stated that it is seeking to sell both of these facilities, which may bear on relief issues in this proceeding. The Commission will permit the parties to address all the issues raised by Kaiser in their briefs, and to submit the evidence relating to those issues as discussed in the briefs.[6] Submission of such evidence shall be limited to each party's initial filing. The parties may direct challenge to the acceptance by the Commission of any such evidence submitted, consistent with the definition of the scope of remand set out in this order and in the opinion of the Court of Appeals. The Commission reserves the power to accept or reject any such additional evidence.

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[2] Although these factors are specifically mentioned by the Court of Appeals, they are not necessarily the only relevant ones. Other factors that may apply here could be any of those mentioned in Parts III.B and III.C of the 1982 Justice Department Merger Guidelines and Part III of the 1982 FTC Statement on Horizontal Mergers.

[3] The Commission retains the option to order evidentiary hearings if necessary to resolve disputed issues of fact arising from the affidavits of the parties.

[4] Evidence of industry developments subsequent to the closing of the record will be accepted on remand in this case because nearly six years have passed since the record was closed and because such evidence may be relevant to the *General Dynamics* issue remanded by the Court of Appeals for determination by the Commission. Although post-acquisition evidence should not be given "too much weight," *FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965), there is authority for relying on "the best information available" in assessing a merger as old as this one. *See Consolidated Foods Corp.*, 380 U.S. at 605–06 (Stewart, J., concurring in the judgment). Moreover, as the Supreme Court noted in *United States* v. *General Dynamics*, 415 U.S. at 504–506, the preference to avoid post-acquisition evidence is based on the recognition that merger partners might temper their competitive conduct in the face of antitrust litigation. In this case, the passage of time and the emphasis that has been placed throughout this litigation on the issue of industry conditions rather than the post-merger conduct of the parties, justify the receipt of some form of post-acquisition evidence.

Kaiser proposes a procedure whereby the parties would file briefs together with limited evidence about industry developments since the record was closed, in the form of affidavits and stipulations, to be followed by oral argument. With some modification, the Commission accepts Kaiser's basic suggestion, and directs the parties to file briefs, together with any stipulations and affidavits, as set forth below. Accordingly,

It is hereby ordered, That within 40 days of Kaiser's receipt of this Order, Kaiser shall file with the Commission and serve upon complaint counsel a brief, not to exceed 60 pages, together with any stipulations or affidavits regarding industry developments occurring after the close of the record;

It is further ordered, That within 40 days of complaint counsel's receipt of Kaiser's brief and any evidentiary submissions, complaint counsel shall file with the Commission and serve upon Kaiser a brief, not to exceed 60 pages, together with any stipulations or affidavits regarding industry developments occurring after the close of the record; and

It is further ordered, That within 20 days of Kaiser's receipt of complaint counsel's brief and any evidentiary submissions, Kaiser may file with the Commission and serve on complaint counsel a reply brief, not to exceed 30 pages, limited to matters discussed in complaint counsel's brief. No further briefs or evidentiary submissions may be filed by either party, and oral argument is not contemplated as necessary to supplement the briefs.

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[5] Letters of Kaiser's counsel to the Commission, dated July 26, 1982, January 11, 1983, and October 11, 1983.

[6] Kaiser states that it would not now plan to brief whether the two relevant markets sustained by the Court of Appeals were supported by substantial evidence, although it would expect to raise this issue in any future review petition it might file in the Court of Appeals. Accordingly, the Commission will not receive evidentiary submissions on that issue. However, the Commission will permit the parties to brief the issue of whether recent developments in legal and economic theory, as reflected in Part II.B.1 of the 1982 Justice Department Merger Guidelines, make it appropriate for the Commission to consider production substitution in identifying the relevant market(s) in this case.

IN THE MATTER OF

NATIONAL ASSOCIATION OF SCHOOL MUSIC DEALERS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3134. Complaint, May 31, 1984—Decision, May 31, 1984

This consent order requires a Coralville, Iowa trade association comprised of dealers specializing in the sale and servicing of school band instruments, among other things, to cease taking any action or encouraging its members to take any action which would interfere with how, or to whom a manufacturer distributes its products.

Appearances

For the Commission: *Thomas J. Keary* and *Robert G. Day*

For the respondent: *Ronald J. Dolan, Peabody, Lambert & Meyers,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 et seq.), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Association of School Music Dealers, Inc. has violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

1. Respondent, National Association of School Music Dealers, Inc. ("NASMD") is a non-profit corporation, organized and existing under the laws of the State of West Virginia, with its principal office located at 1212 5th Street, Coralville, Iowa.

2. NASMD is composed of both voting members, who conduct retail businesses for the promotion and sale of band musical instruments to school music departments, and non-voting members, who may be manufacturers or wholesale distributors of school musical instruments or related equipment. Respondent has approximately 200 retail dealers. NASMD was organized for, and serves its members, *inter alia,* as an instrumentality that facilitates the exchange of ideas concerning improved methods for conducting business in the sale and

distribution of musical instruments. Except to the extent that competition has been restrained as herein alleged, voting members of NASMD have been and now are in competition among themselves and with other sellers of band instruments.

3. Respondent is engaged in representing the pecuniary interests of its members. By virtue of such activities, respondent is a corporation organized to carry on business for the profit of it members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

4. In the course and conduct of their business, members of respondent, among other things, purchase musical instruments which are shipped to them in interstate commerce. Members of respondent sell, at retail, musical instruments which they ship in interstate commerce. As a result of which the acts and practices hereinbelow alleged are in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and respondent is subject to the jurisdiction of the Federal Trade Commission.

5. Respondent's members predominantly sell new brass and woodwind instruments to individual consumers and to institutions, such as school systems. In 1980, total retail sales of brass and woodwind instruments in the United States were approximately $192 million.

6. Individuals and institutions typically purchase new musical instruments from retail dealers. Individual consumers normally purchase from a dealer in their local area, which they select on the basis of the dealer's price and service and the quality of the instruments offered. Institutional purchasers, such as schools, generally solicit bids from local and distant retail dealers and select the retail dealer offering the desired instruments of the desired quality at the lowest cost.

Many retail music dealers concentrate their selling efforts within their local areas. Other retail dealers, sometimes referred to as mail order dealers, both solicit business in their local areas and seek to make sales to purchasers, particularly institutional purchasers, in a broader area. When a mail order dealer makes a sale to a distant customer, the manufacturer may ship the instrument directly to the dealer's customer, rather than to the dealer's place of business.

7. Respondent's members are retail dealers who generally concentrate their selling efforts in their local areas. They face competition from mail order retail dealers, particularly for institutional purchasers. For some time past, respondent and its members have acted in concert to restrict the competition they face from mail order dealers. In furtherance of this plan, respondent and its members have acted to prevent manufacturers of musical instruments from shipping musical instruments directly to a retail dealer's customers, thereby

impeding the ability of mail order dealers to sell musical instruments to distant customers. Furthermore, respondent and its members adopted and distributed to manufacturers of musical instruments a resolution urging manufacturers to eliminate direct shipment to dealers' customers. Respondent and its members also directly or impliedly threatened to refuse to deal with manufacturers who did not comply with the resolution.

Respondent and its members have also acted to restrict competition from manufacturers selling musical instruments at retail. In furtherance of this plan, they have required as a condition of membership in the association that manufacturers agree not to engage in competition with retail dealers.

8. The acts, practices, and methods of competition alleged in paragraph seven have had, or have the tendency or capacity to have, the following effects:

(A) Restraining competition among respondent's members;

(B) Restraining competition between respondent's members and other retail dealers of musical instruments;

(C) Restraining the ability of musical instrument customers, such as school systems, to receive direct shipments from manufacturers, which restraint may tend to increase the cost of musical instruments;

(D) Restraining the ability of manufacturers of musical instruments to ship musical instruments directly to the musical instrument customers, such as school systems, which restraint, as alleged in subparagraph (C) above, may tend to increase the cost of musical instruments; and

(E) Restraining the ability of manufacturers of musical instruments to distribute musical instruments in any manner that would place the manufacturer in competition with respondent's members and other retail dealers of musical instruments.

9. The aforesaid acts and practices of respondent constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent National Association of School Music Dealers, Inc., sometimes hereinafter referred to as NASMD, is a non-profit corporation, organized and existing under the laws of the state of West Virginia, with its principal office located at 1212 5th Street, Coralville, Iowa.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That NASMD, its officers, directors, representatives, agents, employees, successors and assigns, and any subsidiary, committee, division or other device shall cease and desist from:

A. Taking any action, directly or indirectly, on behalf of its members, including but not limited to any actual or threatened boycott or refusal to deal, which has the purpose or effect of interfering with any musical instrument manufacturer's decision as to how or to whom it distributes its product(s).

B. Requesting, urging, recommending or suggesting that NASMD members take any action, directly or indirectly, including but not limited to any actual or threatened boycott or refusal to deal, which has the purpose or effect of interfering with any musical instrument manufacturer's decision as to how or to whom it distributes its product(s).

II.

It is further ordered, That this Order shall not be construed to prevent NASML from merely providing information or its members' views to musical instrument manufacturers concerning the effects on NASMD members of the ways in which the manufacturers distribute their products, so long as the information or views are not provided in a manner constituting an actual or threatened boycott or refusal to deal.

III.

It is further ordered, That:

A. NASMD shall mail to each of its members and to each person to whom it sent written notification of the NASMD resolution of February 9, 1982, a copy of the Commission's Order in this matter and a letter in the form shown as "Appendix A" to this Order.

B. For a period of two (2) years after the date of service of this Order, NASMD shall also provide each new NASMD member with a copy of this Order at the time the member is accepted into membership.

IV.

It is further ordered, That, for a period of three (3) years following the effective date of the Order, NASMD shall maintain in its files a copy of the minutes of each meeting of its membership and of each meeting of its board of directors and a copy of all correspondence received from, or sent to, any mail order dealer, any manufacturers of musical instruments or any association representing manufacturers of musical instruments and that such copies of minutes and correspondence be made available for inspection by representatives of the Federal Trade Commission upon written request.

V.

It is further ordered, That, within sixty (60) days after service of this Order, respondent shall file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order. Thereafter, additional reports shall be filed at such other times as the Commission may, by written notice to respondent, require.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in it, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this Order.

APPENDIX A

(Respondent's Letterhead)

Dear ____________

As you may be aware, the Federal Trade Commission (FTC) has been investigating certain activities of the National Association of School Music Dealers (NASMD) and NASMD has voluntarily entered into an agreement with the FTC which resulted in the issuance by the Commission on (date) of a complaint and the entry of a consent order. The order requires that you be sent a copy of the order and this letter.

In accordance with the terms of the FTC's order, you are hereby notified that NASMD will cease and desist from taking any action on behalf of its members, such as an actual or threatened boycott or refusal to deal, which has the purpose or effect of interfering with any musical instrument manufacturer's decision as to how or to whom it distributes its products. Further, NASMD will not urge, recommend or suggest that its members take such action.

A copy of the order is enclosed.

Sincerely,

____

President

Enclosures

IN THE MATTER OF

ADRIA LABORATORIES, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3135. Complaint, June 5, 1984—Decision, June 5, 1984

This consent order requires a Dublin, Ohio manufacturer and seller of over-the-counter drugs, among other things, to cease promoting "Efficin," or any other over-the-counter internal analgesic containing magnesium salicylate, by representing that the product contains no aspirin, or by comparing the product's safety to any product containing aspirin, unless representations are accompanied by prescribed disclosure warnings and substantiated by reliable and competent scientific evidence.

Appearances

For the Commission: *T. Bringier McConnell,* Washington, D.C.

For the respondent: *Alan A. Kaplan, Kleinfeld, Kaplan & Becker,* Washington, D.C., and *Bethany A. Beck,* in-house counsel, Columbus, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Adria Laboratories, Inc. a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located in Dublin, Ohio.

PAR. 2. Respondent is now and for some time in the past has been engaged in the manufacture, offering for sale, and sale of over-the-counter drugs, including Efficin.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising and promotional material, including, but not limited to, the advertising and labeling referred to herein, to promote the sale of Efficin.

PAR. 4. Respondent operates in various States of the United States and in the District of Columbia. Respondent's manufacture, offering for sale, sale, and distribution of over-the-counter drugs, including Efficin, mentioned herein, constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and is now, in substantial competition in or affecting commerce with firms and corporations engaged in the sale of merchandise of the same general kind and nature as merchandise sold by respondent.

PAR. 6. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements for over-the-counter drugs, including Efficin, by various means in or affecting commerce, including, *inter alia,* broadcast, national magazines, product labels, point-of-sales brochures, and other means, distributed by mail and across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products.

PAR. 7. Typical advertisements and promotional materials, disseminated as previously described, are attached hereto as Exhibits A through I. Included *inter alia* in those advertisements and promotional materials is the statement "Contains No Aspirin. . . ."

PAR. 8. Through the use, *inter alia,* of the advertisements referred to in Paragraph Seven, and other advertisements or promotional materials not specifically set forth herein, respondent has represented, and now represents, to consumers directly or by implication, one or more of the following:

(a) Efficin is not associated with most of the side effects and contraindications with which aspirin is associated.

(b) Use of Efficin poses a lesser risk of suffering the side effects associated with aspirin than does use of aspirin.

(c) The side effects associated with both aspirin and Efficin are less severe with Efficin than with aspirin.

PAR. 9. The representation in Paragraph Eight (a) is false, for the reason that Efficin is similar to aspirin, and that the ingredient in Efficin has been associated with most of the same side effects and contraindications as aspirin.

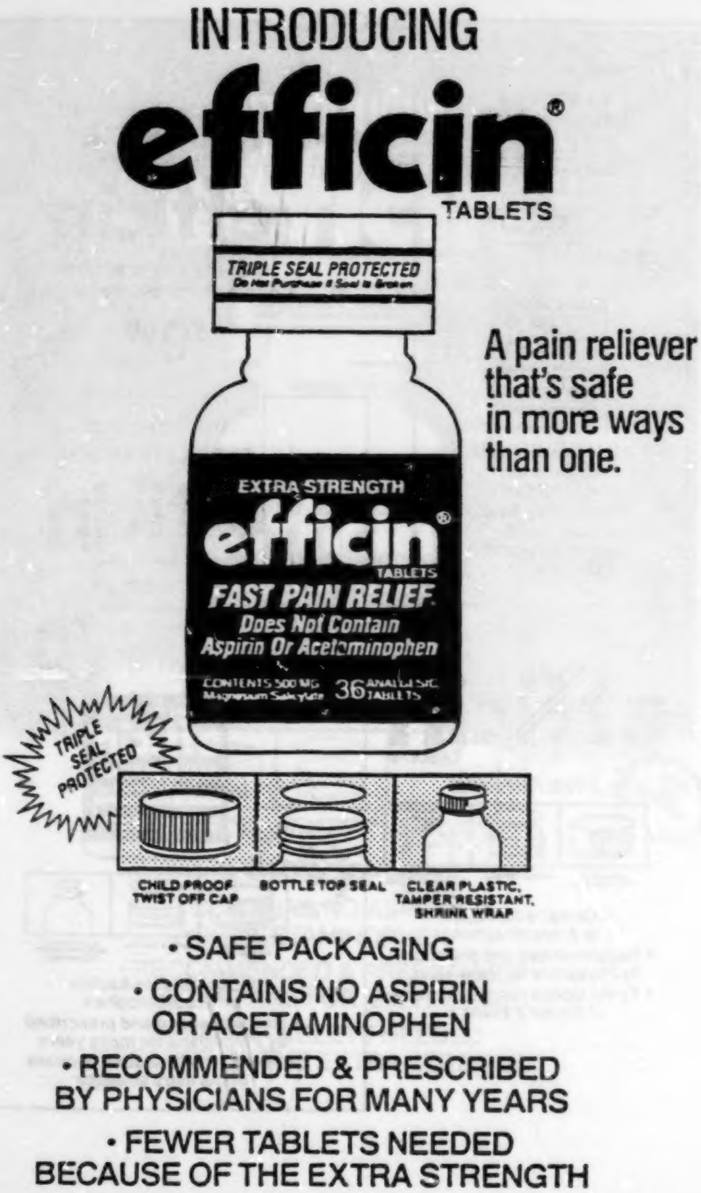
PAR. 10. Through the use of the advertisements referred to in Paragraph Seven, and other advertisements not specifically set forth herein, respondent has represented, directly or by implication, that it possessed and relied upon a reasonable basis for the representations set forth in Paragraph Eight (b) and (c) at the time of the initial dissemination of the representations and each subsequent dissemination. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

PAR. 11. Respondent has failed to disclose in the advertisements referred to in Paragraph Seven that Efficin is similar to aspirin, and that the ingredient in Efficin has been associated with many of the same side effects and contraindications as aspirin. In light of the statements and representations referred to in Paragraph Eight, such failure is an omission of material fact, and the advertisements referred to above are false within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 12. The use by respondent of the aforesaid statements, representations, acts, and practices, directly or by implication, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid statements, representations, acts, and practices, have had and now have the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said statements and representations were and are true and complete and to induce such persons to purchase Efficin by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondent, herein alleged as deceptive, were and are all to the prejudice and injury of the public and constituted and now constitute unfair or deceptive acts and practices in or affecting commerce and false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

EXHIBIT A



INTRODUCING

efficin®

TABLETS

A pain reliever
that's safe
in more ways
than one.

TRIPLE SEAL PROTECTED
Do Not Purchase if Seal is Broken
EXTRA STRENGTH
efficin®
TABLETS
FAST PAIN RELIEF
Does Not Contain
Aspirin Or Acetaminophen
CONTENTS 500 MG
Magnesium Salicylate
36 ANALGESIC TABLETS
TRIPLE SEAL PROTECTED
CHILD PROOF TWIST OFF CAP
BOTTLE TOP SEAL
CLEAR PLASTIC, TAMPER RESISTANT, SHRINK WRAP

- SAFE PACKAGING
- CONTAINS NO ASPIRIN OR ACETAMINOPHEN
- RECOMMENDED & PRESCRIBED BY PHYSICIANS FOR MANY YEARS
- FEWER TABLETS NEEDED BECAUSE OF THE EXTRA STRENGTH

EXHIBIT B

CO-OP AD

Introducing
Extra Strength
efficin®
TABLETS

$0^{00}

- Triple Seal Protected
- Child proof twist off cap
- Bottle Top Seal
- Clear plastic, tamper resistant, shrink wrap

FAST PAIN RELIEF
EXTRA STRENGTH
efficin®
TABLETS

- contains no aspirin
- clinically proven effective

$0^{00}

efficin®
TABLETS

TRIPLE SEAL PROTECTED
Fast Pain Relief
CHILD PROOF TWIST OFF CAP
BOTTLE TOP SEAL
CLEAR PLASTIC, TAMPER RESISTANT, SHRINK WRAP

- Contains No Aspirin or Acetaminophen
- Recommended and prescribed by Physicians for many years
- Fewer tablets needed because of the extra strength

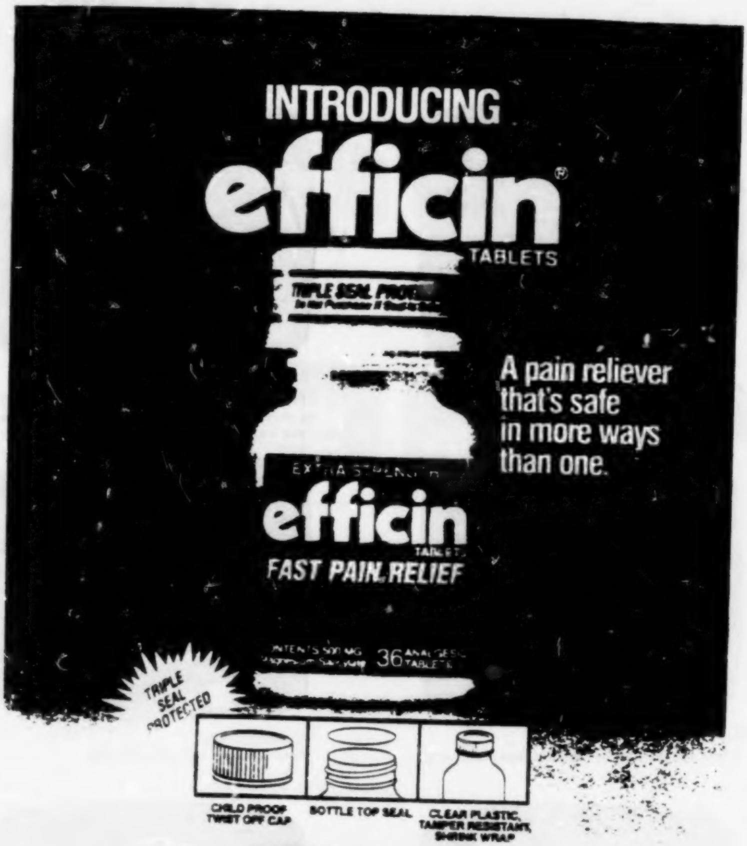
Introducing
EXTRA STRENGTH
efficin®
TABLETS

TRIPLE SEAL PROTECTED
EXTRA STRENGTH
efficin
FAST PAIN RELIEF
Does Not Contain Aspirin Or Acetaminophen
36
TRIPLE SEAL PROTECTED
CHILD PROOF TWIST OFF CAP
BOTTLE TOP SEAL
CLEAR PLASTIC, TAMPER RESISTANT, SHRINK WRAP

$0^{00}

- Contains No Aspirin or Acetaminophen
- Recommended and prescribed by Physicians for many years
- Fewer tablets needed because of the extra strength

EXHIBIT C



INTRODUCING

efficin®

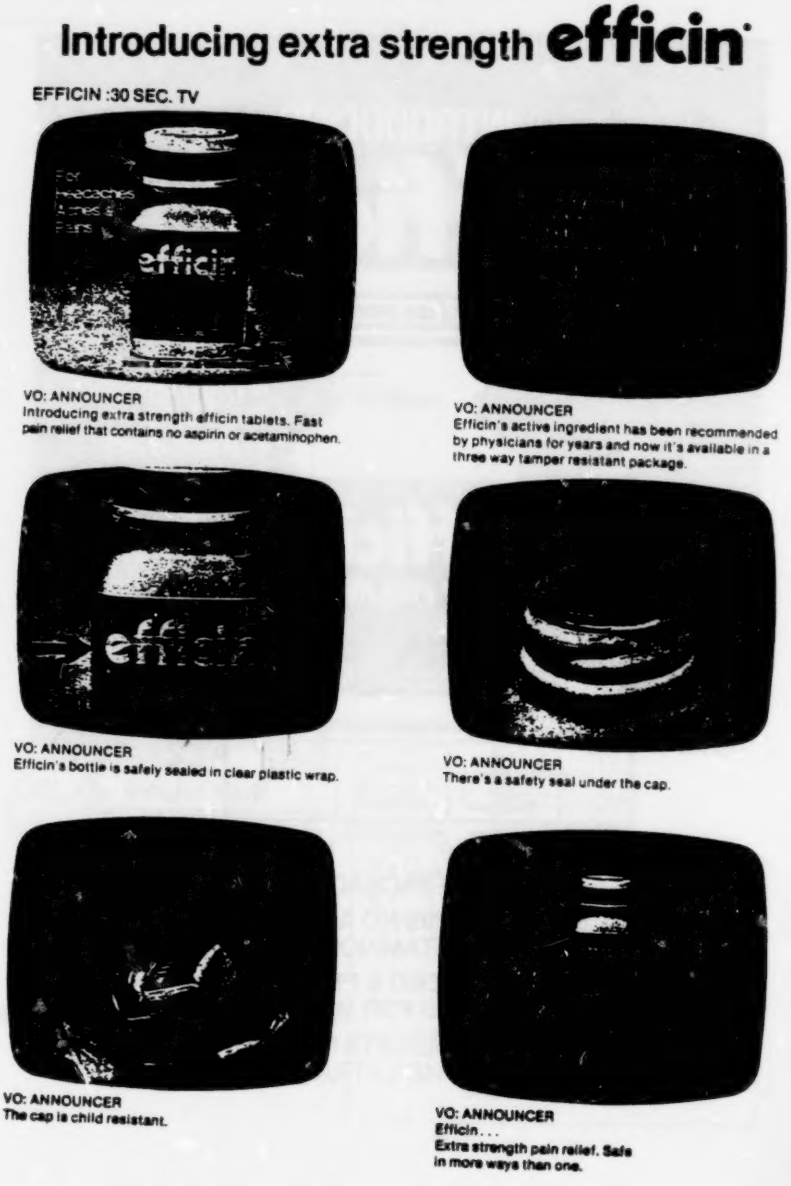
TABLETS

A pain reliever that's safe in more ways than one.

TRIPLE SEAL PROTECTED
EXTRA STRENGTH
efficin
TABLETS
FAST PAIN RELIEF
36 ANALGESIC TABLETS
TRIPLE SEAL PROTECTED
CHILD PROOF TWIST OFF CAP
BOTTLE TOP SEAL
CLEAR PLASTIC, TAMPER RESISTANT, SHRINK WRAP

- SAFE PACKAGING
- CONTAINS NO ASPIRIN OR ACETAMINOPHEN
- RECOMMENDED & PRESCRIBED BY PHYSICIANS FOR MANY YEARS
- FEWER TABLETS NEEDED BECAUSE OF THE EXTRA STRENGTH

EXHIBIT D



For
Headaches
Aches &
Pains
efficin
efficin

Introducing extra strength efficin®

EFFICIN :30 SEC. TV

VO: ANNOUNCER
Introducing extra strength efficin tablets. Fast pain relief that contains no aspirin or acetaminophen.

VO: ANNOUNCER
Efficin's active ingredient has been recommended by physicians for years and now it's available in a three way tamper resistant package.

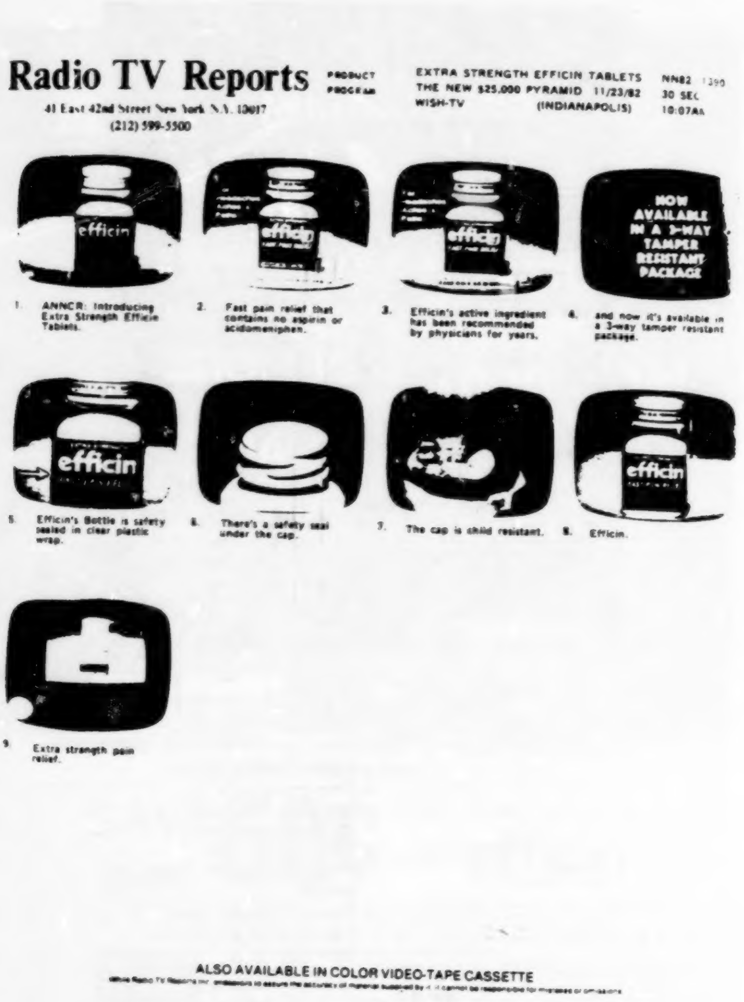
VO: ANNOUNCER
Efficin's bottle is safely sealed in clear plastic wrap.

VO: ANNOUNCER
There's a safety seal under the cap.

VO: ANNOUNCER
The cap is child resistant.

VO: ANNOUNCER
Efficin . . .
Extra strength pain relief. Safe in more ways than one.

EXHIBIT E


efficin
NOW
AVAILABLE
IN A 3-WAY
TAMPER
RESISTANT
PACKAGE

Radio TV Reports

41 East 42nd Street New York N.Y. 10017
(212) 599-5500

PRODUCT EXTRA STRENGTH EFFICIN TABLETS NN82 1390
PROGRAM THE NEW $25,000 PYRAMID 11/23/82 30 SEC
WISH-TV (INDIANAPOLIS) 10:07AM

1. ANNCR: Introducing Extra Strength Efficin Tablets.

2. Fast pain relief that contains no aspirin or acidomeniphen.

3. Efficin's active ingredient has been recommended by physicians for years.

4. and now it's available in a 3-way tamper resistant package.

5. Efficin's Bottle is safety sealed in clear plastic wrap.

6. There's a safety seal under the cap.

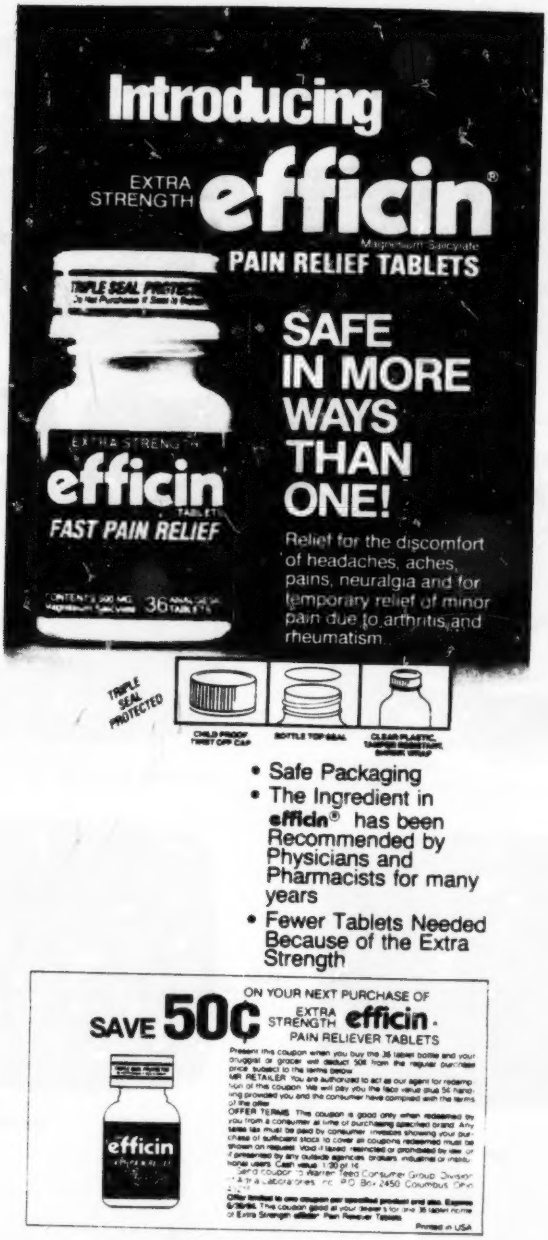
7. The cap is child resistant.

8. Efficin.

9. Extra strength pain relief.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT F


TRIPLE SEAL PROTECTED
Do Not Purchase If Seals Is Broken
EXTRA STRENGTH
efficin
TABLETS
FAST PAIN RELIEF
CONTENTS 500 MG. Magnesium Salicylate
36 ANALGESIC TABLETS
TRIPLE SEAL PROTECTED
CHILD PROOF TWIST OFF CAP
BOTTLE TOP SEAL
CLEAR PLASTIC, TAMPER RESISTANT, SHRINK WRAP
efficin

Introducing

EXTRA STRENGTH efficin®

Magnesium Salicylate

PAIN RELIEF TABLETS

SAFE IN MORE WAYS THAN ONE!

Relief for the discomfort of headaches, aches, pains, neuralgia and for temporary relief of minor pain due to arthritis and rheumatism.

- Safe Packaging
- The Ingredient in **efficin**® has been Recommended by Physicians and Pharmacists for many years
- Fewer Tablets Needed Because of the Extra Strength

SAVE 50¢ ON YOUR NEXT PURCHASE OF EXTRA STRENGTH **efficin**® PAIN RELIEVER TABLETS

Present this coupon when you buy the 36 tablet bottle and your druggist or grocer will deduct 50¢ from the regular purchase price subject to the terms below

MR RETAILER You are authorized to act as our agent for redemption of this coupon. We will pay you the face value plus 5¢ handling provided you and the consumer have complied with the terms of the offer

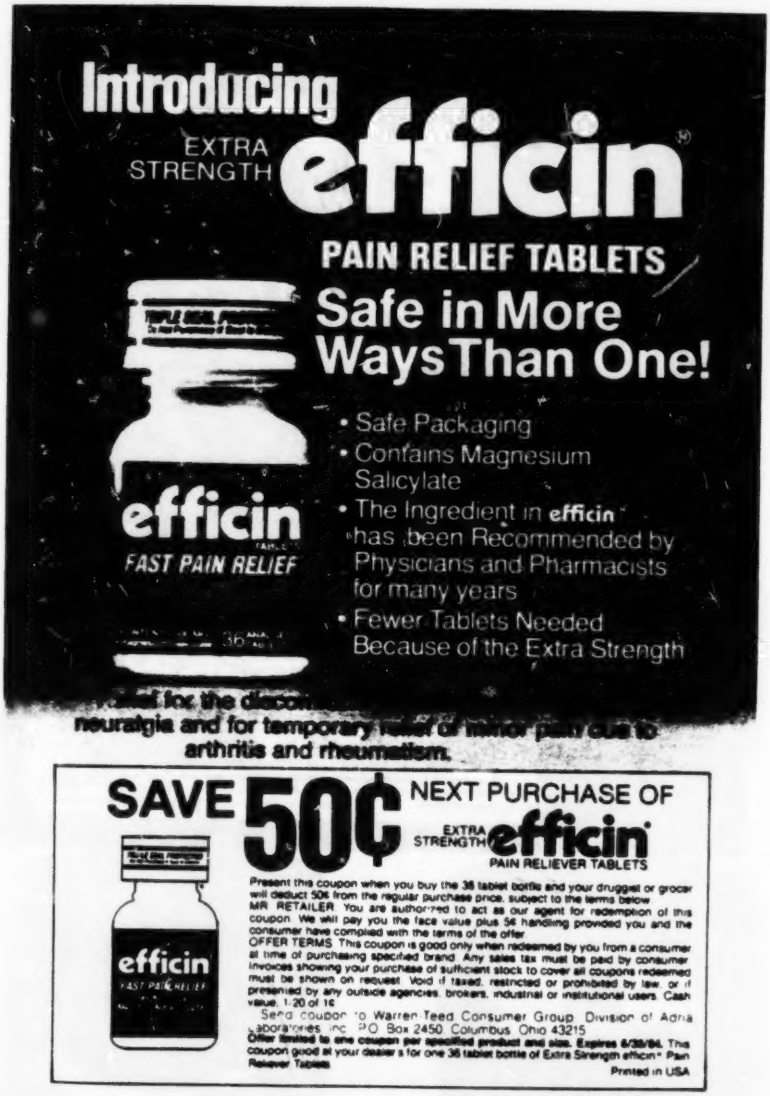
OFFER TERMS This coupon is good only when redeemed by you from a consumer at time of purchasing specified brand. Any sales tax must be paid by consumer. Invoices showing your purchase of sufficient stock to cover all coupons redeemed must be shown on request. Void if taxed, restricted or prohibited by law or if presented by any outside agencies, brokers, industrial or institutional users. Cash value 1/20 of 1¢

Send coupon to Warren Teed Consumer Group, Division of Adria Laboratories, Inc. P.O. Box 2450 Columbus, Ohio [illegible]

Offer limited to one coupon per specified product and size. Expires 6/30/84. This coupon good at your dealer's for one 36 tablet bottle of Extra Strength **efficin** Pain Reliever Tablets.

Printed in USA

EXHIBIT G


efficin
FAST PAIN RELIEF
36
efficin
FAST PAIN RELIEF

Introducing

EXTRA STRENGTH **efficin**®

PAIN RELIEF TABLETS

Safe in More Ways Than One!

- Safe Packaging
- Contains Magnesium Salicylate
- The Ingredient in **efficin**® has been Recommended by Physicians and Pharmacists for many years
- Fewer Tablets Needed Because of the Extra Strength

[illegible] for the discom[illegible] neuralgia and for temporary relief of minor pain due to arthritis and rheumatism.

SAVE 50¢ NEXT PURCHASE OF EXTRA STRENGTH **efficin**® PAIN RELIEVER TABLETS

Present this coupon when you buy the 36 tablet bottle and your druggist or grocer will deduct 50¢ from the regular purchase price, subject to the terms below

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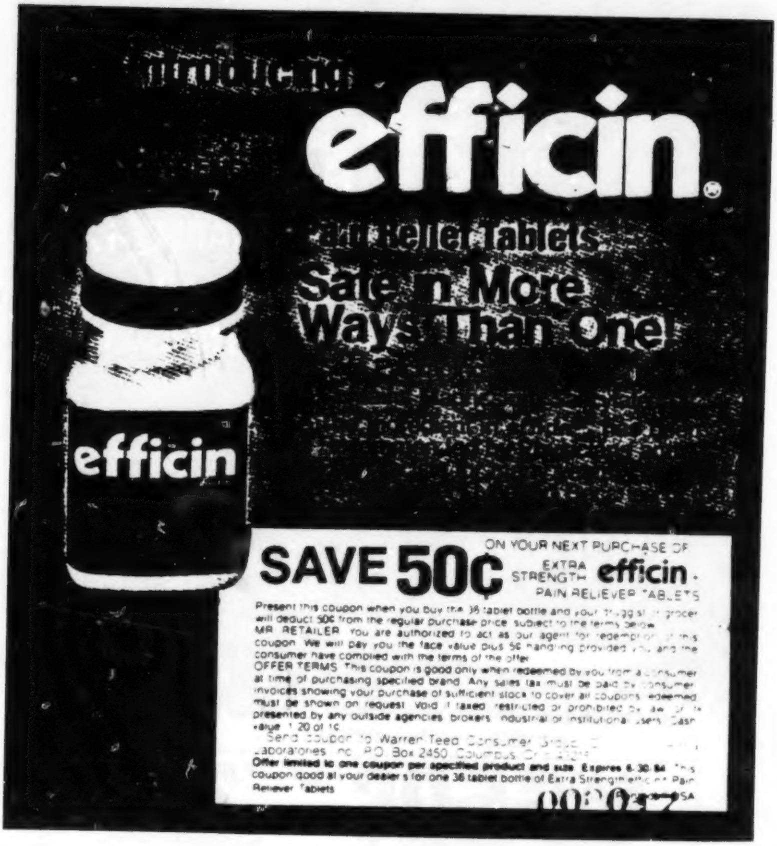
OFFER TERMS This coupon is good only when redeemed by you from a consumer at time of purchasing specified brand Any sales tax must be paid by consumer Invoices showing your purchase of sufficient stock to cover all coupons redeemed must be shown on request Void if taxed, restricted or prohibited by law, or if presented by any outside agencies, brokers, industrial or institutional users Cash value 1/20 of 1¢

Send coupon to Warren-Teed Consumer Group Division of Adria Laboratories Inc PO Box 2450 Columbus Ohio 43215

Offer limited to one coupon per specified product and size. Expires 6/30/84. This coupon good at your dealer's for one 36 tablet bottle of Extra Strength efficin® Pain Reliever Tablets

Printed in USA

EXHIBIT H


Introducing
efficin®
Pain Relief Tablets
Safe In More Ways Than One
efficin

SAVE 50¢ ON YOUR NEXT PURCHASE OF EXTRA STRENGTH **efficin**® PAIN RELIEVER TABLETS

Present this coupon when you buy the 36 tablet bottle and your druggist or grocer will deduct 50¢ from the regular purchase price, subject to the terms below.

MR. RETAILER: You are authorized to act as our agent for redemption of this coupon. We will pay you the face value plus 5¢ handling provided you and the consumer have complied with the terms of the offer.

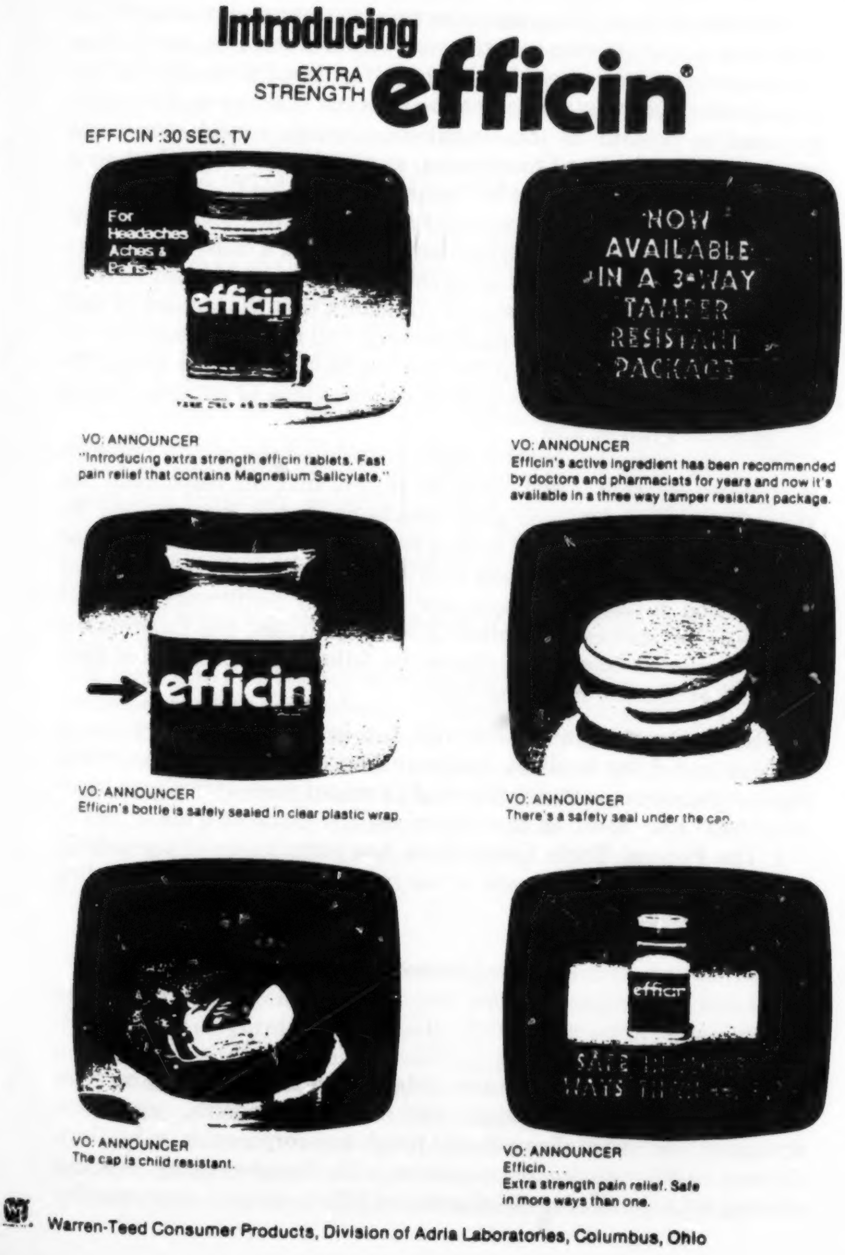
OFFER TERMS: This coupon is good only when redeemed by you from a consumer at time of purchasing specified brand. Any sales tax must be paid by consumer. Invoices showing your purchase of sufficient stock to cover all coupons redeemed must be shown on request. Void if taxed, restricted or prohibited by law or if presented by any outside agencies, brokers, industrial or institutional users. Cash value 1/20 of 1¢.

Send coupon to Warren-Teed Consumer Group, [illegible] Laboratories, Inc., P.O. Box 2450, Columbus, Ohio [illegible]

Offer limited to one coupon per specified product and size. Expires 6-30-84. This coupon good at your dealer's for one 36 tablet bottle of Extra Strength efficin® Pain Reliever Tablets.

USA

EXHIBIT I



Introducing
EXTRA STRENGTH **efficin®**

EFFICIN :30 SEC. TV

For Headaches Aches & Pains
efficin

VO: ANNOUNCER
"Introducing extra strength efficin tablets. Fast pain relief that contains Magnesium Salicylate."

NOW AVAILABLE IN A 3-WAY TAMPER RESISTANT PACKAGE

VO: ANNOUNCER
Efficin's active ingredient has been recommended by doctors and pharmacists for years and now it's available in a three way tamper resistant package.

efficin

VO: ANNOUNCER
Efficin's bottle is safely sealed in clear plastic wrap.

VO: ANNOUNCER
There's a safety seal under the cap.

VO: ANNOUNCER
The cap is child resistant.

VO: ANNOUNCER
Efficin . . .
Extra strength pain relief. Safe in more ways than one.

Warren-Teed Consumer Products, Division of Adria Laboratories, Columbus, Ohio

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Adria Laboratories, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5000 Post Road, in the City of Dublin, State of Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Adria Laboratories, Inc. a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of Efficin or any other over-the-counter internal analgesic containing magnesium salicylate affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the product contains no aspirin, or any other representation, directly or by implication, comparing the product's safety to any product containing aspirin, unless the following statement is clearly and prominently disclosed:

A. "Efficin (or other product's name) has side effects similar to aspirin."

B. If Efficin's (or other product's) label discloses that consumers should not take the product if they have stomach distress, ulcers or bleeding problems except under the direction and supervision of a physician, respondent may substitute the following statement for the disclosure required in Part I(A): "Efficin (or other product's name) is similar to aspirin. Read label including warnings."

C. If Efficin's (or other product's) package insert discloses that consumers should not take the product if they have stomach distress, ulcers or bleeding problems except under the direction and supervision of a physician, respondent may substitute the following statement for the disclosure required in Part I(A): "Efficin (or other product's name) is similar to aspirin. Read and save package insert including warnings."

D. Such other statement approved by the Federal Trade Commission in advance, or

E. Such other statement as respondent can demonstrate (based on consumer surveys whose design is adequate and previously approved by the Federal Trade Commission) will convey the same messages as conveyed by the statement in Parts I(A), I(B), or I(C) as applicable.

Provided, That it shall not violate this Part to distribute packages of Efficin that were fully packaged as of October 18, 1983, that do not contain a disclosure statement required by this Part.

II

A. *It is further ordered,* That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale, or distribution of any over-the-counter drug product affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning the safety of such product or from comparing any such product to any product or products of one or more competitors concerning safety, unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for such representation, consisting of reliable and competent scientific evidence that substantiates each such representation.

B. To the extent the evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" for purposes of Part II(A) only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

III

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IV

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions involved in the marketing of over-the-counter drugs.

V

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VI

It is further ordered, That, for the period of three years after it last disseminated the advertisements of the products covered by this order, respondent shall maintain accurate records:

1. Of all materials that were relied upon by respondent in disseminating any representation covered by this order.
2. Of all test reports, studies, surveys, or demonstrations in its

possession or control or of which it has knowledge that contradict any representation made by respondent that is covered by this order.

These records may be inspected by the staff of the Commission upon reasonable notice.

Commissioner Pertschuk dissented from failure to include an unfairness allegation in the complaint.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8918. Final Order, September 9, 1981—Modifying Order June 7, 1984

This order reopens the proceeding and modifies the Commission's order issued on September 9, 1981, (98 F.T.C. 136), *modified* April 8, 1983 (101 F.T.C. 698), *modified further* Feb. 7, 1984 (103 F.T.C. 57) so that its basic provisions are in parity with the Commission order in *Bristol-Myers Company,* [102 F[illegible].C. 21 (1983)] and *Sterling Drug, Inc.,* [102 F.T.C. 395 (1983)]. Under the modified order, the company must have a reasonable basis consisting of reliable scientific evidence for all therapeutic performance or safety claims. The previous order covered such claims only if they compared one product to another.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Respondent American Home Products Corporation in a "renewed request" filed on January 27, 1984, petitioned to reopen these proceedings and modify the Order. This request was placed on the public record for comment, with no comments filed.

On April 5, 1984, pursuant to discussion with Commission staff, respondent filed a proposed Order which was agreed to by staff. This proposed Order suggests changes in the Modified Order to Cease and Desist of April 8, 1983, as modified by Order of February 7, 1984. The proposed Order adds a new paragraph 1(A)(4) and substitutes new language for paragraphs 1(B), III, and IV. With these modifications the basic provisions of this Order will be in general parity with the Commission's Orders in *Bristol-Myers Company,* Docket No. 8917 [102 F.T.C. 21 (1983)] and *Sterling Drug, Inc.,* Docket No. 8919. [102 F.T.C. 395 (1983)]

The Commission being of the opinion that the public interest would be served by such reopening of the proceedings;

Now, therefore, it is ordered, That the proceedings in Docket No. 8918 be, and they hereby are, reopened; and

It is further ordered, That the Order in Docket No. 8918 be substituted as to respondent American Home Products Corporation by a modified Order as follows:

ORDER

I

It is ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees; directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that a claim concerning the superior effectiveness or superior freedom from side effects of such product has been established or proven unless such representation has been established by two or more adequate and well-controlled clinical investigations, conducted by independent experts qualified by training and experience to evaluate the comparative effectiveness or comparative freedom from side effects of the drugs involved, on the basis of which it could fairly and responsibly be concluded by such experts (1) that the drug will have the comparative effectiveness or freedom from side effects that it is represented to have, and (2) that such comparative effectiveness or freedom from side effects is demonstrated by methods of statistical analysis, and with levels of confidence, that are generally recognized by such experts. The investigations shall be conducted in accordance with the procedures set forth below:

At least one of the adequate and well-controlled clinical investigations to evaluate the comparative effectiveness of the drug shall be conducted on any disease or condition referred to, directly or by implication; or, if no specific disease or condition is referred to, then the adequate and well-controlled clinical investigations shall be conducted on at least two conditions or diseases for which the drug is effective. The clinical investigation shall be conducted as follows:

1. The subjects must be selected by a method that:

a. Provides adequate assurance that they are suitable for the purposes of the investigation, and diagnostic criteria of the condition to be treated (if any);

b. Assigns the subjects to the test groups in such a way as to minimize bias; and

c. Assures comparability in test and control groups of pertinent variables, such as age, sex, severity or duration of disease or condition (if any), and use of drugs other than the test drugs.

2. The investigations must be conducted double-blind, and methods of double-blinding must be documented. In addition, the investigations shall contain a placebo control to permit comparison of the results of use of the test drugs with an inactive preparation designed to resemble the test drugs as far as possible.

3. The plan or protocol for the investigations and the report of the results include the following:

a. A clear statement of the objective of the investigation;

b. An explanation of the methods of observation and recording of results, including the variables measured, quantitation, assessment of any subject's response and steps taken to minimize bias on the part of subject and observer;

c. A comparison of the results of treatments or diagnosis with a control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysts of the data.

d. A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.

4. A test or investigation which is not conducted in accordance with these procedures may be used to establish a claim only if respondent can show that, notwithstanding the failure to satisfy these procedures, the test or investigation would still be generally accepted by the relevant scientific community as sufficient to establish the truth of the claim.

B. Making any therapeutic performance or freedom from side effects claim for such product unless respondent possesses a reasonable basis for making that claim. A reasonable basis for such a claim shall consist of competent and reliable scientific evidence supporting that claim. Well-controlled clinical tests conducted in accordance with the criteria set forth in Order Paragraph IA shall be deemed to constitute a reasonable basis for a claim.

II

It is further ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any other non-prescription drug product, in or affecting commerce, as "commerce" and "drug" are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that such product contains any unusual or special ingredient when such ingredient is commonly used in other non-prescription drug products intended for the same use or uses as the product advertised by respondent.

B. Making any false representation that such product has more of an active ingredient than any class of competing products.

C. Misrepresenting in any manner any test, study or survey or any of the results thereof, concerning the comparative effectiveness or freedom from side effects of such product.

III

It is further ordered, That respondent American Home Products Corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of "Anacin," or "Arthritis Pain Formula," or any other nonprescription internal analgesic in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from falsely representing that the analgesic ingredient in an aspirin-containing product is different from aspirin or otherwise misrepresenting the identity of any analgesic ingredient. It shall be a violation of this paragraph to contrast the analgesic ingredient of a product which contains aspirin with the analgesic ingredient of another product if that product also contains aspirin, unless respondent discloses clearly and conspicuously that the analgesic ingredient in its product is aspirin. This provision shall not become effective until Orders in Dockets 8917 and 8919 have become final. [102 F.T.C. 21, 395 (1983)]

IV

If the Commission makes any changes in the Orders entered in Dockets 8917 and 8919, respondent American Home Products Corporation may petition the Commission to make similar changes in the corresponding provisions, if any, of this Order. This paragraph shall not be deemed to limit respondent's right to petition for modification pursuant to any applicable statute or regulation.

V

It is further ordered, That respondent American Home Products Corporation, shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergency of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations under this Order.

It is further ordered, That the respondent herein shall within sixty (60) days after service of this Order, and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which it has complied or intends to comply with this Order.

IN THE MATTER OF

E.I. DUPONT DE NEMOURS & COMPANY

Docket 9108. Interlocutory Order, June 12, 1984

ORDER EXTENDING *IN CAMERA* TREATMENT

By Order of the Commission, dated January 21, 1981, certain exhibits in the record of Docket No. 9108 were accorded *in camera* status for a three year period. The Order has now expired and respondent, E.I. DuPont de Nemours and Company ("DuPont") has moved the Commission, pursuant to a January 20, 1984 motion, for return of all *in camera* exhibits in Docket No. 9108 which are part of the record in that proceeding. In the alternative, respondent has asked the Commission for an extension of *in camera* treatment for certain exhibits indefinitely, or at least for three additional years with a provision for further *in camera* treatment upon a showing of good cause therefor.

After consideration of DuPont's motion, the Commission denies respondent's request for return of all *in camera* exhibits in the record of the *DuPont* proceeding. The Federal Trade Commission Act ("FTC Act") and the Commission's Rules of Practice allow for return of documentary materials submitted to the Commission *except* those materials offered and received in evidence in a Commission proceeding.[1] The Commission's Rules reflect its desire to maintain a full and accurate record of Commission deliberative considerations, as well as to preserve records of Commission activities which have legitimate informational value to its law enforcement functions.[2]

The Commission also denies respondent's request for indefinite *in camera* treatment for certain specified exhibits. That request, seeking *in camera* protection in perpetuity, fails to meet the Commission standard for *in camera* treatment, *i.e.*, disclosure of documents must result in "clearly defined serious injury to the person or corporation whose records are involved." *H.P. Hood & Sons, Inc.,* 58 F.T.C. 1184, 1188 (1958); Commission Rule 3.45. At some point in the future, DuPont's confidential information may well lose its competitive sensitivity and have little value to its competitors. Given the importance of keeping the Commission's activities open to public review and scrutiny, it is appropriate to make the record in the *DuPont* matter publicly available at some point in time, provided sensitive and confidential business information is not disclosed.

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[1] Specifically, under Section 21(b)(5) of the FTC Act, when materials are produced in the course of an investigation and any proceeding arising out of the investigation is complete,

> then the custodian shall, upon written request of the person who produced the material, return to the person any such material *which has not been received into the record* of any such proceeding.

(emphasis added). *See also* Commission rule 4.12(a) which states:

> Any person who has submitted documentary material to the Commission . . . may obtain, on request, the return of material submitted to the Commission *which has not been received into evidence*. . . .

Because the FTC Act and the Commission's Rules do not provide for the return of the "originals" of the documents in question it is unnecessary to determine whether Dupont has met the "extraordinary circumstances" showing required by Rule 4.12(b) for the return of copies of documents made by the Commission.

[2] The Commission is required by Federal law to preserve records received by the agency in connection with the transaction of public business "as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." Federal Records Act, 44 U.S.C. 3301; *see also* Commission's Rules of Practice, Rule 4.12(c).

Finally, the Commission finds sufficient grounds for extending *in camera* protection for certain DuPont exhibits based upon the standard reflected by Commission Rule 3.45(b) and explained in *H.P. Hood & Sons, Inc., supra.* An applicant for *in camera* status is required to show that the information in the documents is "sufficiently secret" and "sufficiently material" to its business that disclosure would result in serious competitive injury. *General Foods Corporation,* 95 F.T.C. 352, 355 (1980). The Commission places a greater burden on a respondent to demonstrate that disclosure would result in competitive injury for information over three years old. *General Foods, supra,* 95 F.T.C. 353.

Although respondent's confidential data is over three years oid, respondent has made a convincing showing that it remains possible, through sophisticated extrapolation techniques, that DuPont's current cost information could be computed by its competitors from the data presently in the record. Given the limited number of documents involved in respondent's request, the finite time period of continued protection requested, and the clear possibility that disclosure will result in "clearly defined serious injury" if such information is disclosed, it is not unreasonable to extend *in camera* treatment for an additional three years. At the conclusion of another three year period, both DuPont and the Commission will be better situated to evaluate the necessity of further *in camera* treatment for the documents in question.[3] Therefore,

It is ordered, That the following exhibits presently in the *in camera* record of Docket No. 9108 shall remain *in camera* for three years from the date of this Order, at which time respondent may show cause why those documents should not be made public:

CX 21N
CX 29M
CX 32I
CX 50N
CX 54H
CX 64D–I

CX 173D
CX 178T
CX 182G–H
CX 182J
CX 183D
CX 196D

CX 211Z(40)
CX 219A–N
CX 241A–O
CX 255A–E
CX 255H–L
CX 264A–B

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[3] As the underlying data become older, any extrapolation techniques will likely become less accurate, and will pose less risk of competitive harm.

CX 68X
CX 68Z(1)
CX 81A–F
CX 82A
CX 83A
CX 117A–F
CX 129C
CX 132G–H
CX 146C
CX 146E
CX 149D
CX 149F
CX 149H–J
CX 149T
CX 149V
CX 133R
CX 158M–N
CX 158Z(32)–Z(33)
CX 169A
CX 170I
CX 173B
CX 196F
CX 196I
CX 196K–M
CX 196Y–Z(1)
CX 198H
CX 200C
CX 208A–D
CX 209K–Z
CX 209LL
CX 210C–E
CX 210G–H
CX 211F–J
CX 211L–P
CX 211R–V
CX 211X–Z(2)
CX 211Z(4)–Z(8)
CX 211Z(11)–Z(15)
CX 211Z(17)–Z(21)
CX 211Z(23)–Z(27)
CX 211Z(29)–Z(33)
CX 211Z(35)–Z(38A)
RX 1S
RX 6E
RX 17B–C
RX 18A
RX 19A
RX 32A–W
RX 34A–C
RX 35A–B
RX 35D–O
RX 36A–N
RX 37A–B
RX 37H–Q
RX 38A–B
RX 38E–P
RX 38S
RX 39A–B
RX 39H–O
RX 40A–B
RX 40I–P
RX 40S

In the Matter of

VOLKSWAGEN OF AMERICA, INC., ET AL.

Docket 9154. Interlocutory Order, June 19, 1984

This order requires respondents to establish a depository arrangement, on terms to be negotiated, whereby Complaint Counsel may examine relevant documents and information without the Commission taking custody of the material.

Order

Administrative Law Judge John J. Mathias has certified to the Commission complaint counsel's motion requesting *in camera* treatment for all documents and information to be submitted by Volkswagenwerk AG ("VWAG") for purposes of discovery in Volkswagen of America, Inc., D. 9154. The relevant materials are located in Germany and in the possession of the German government because the ALJ ordered the parties to transmit the documents through diplomatic channels as an alternative to ruling on VWAG's motion to quash the discovery subpoena. Although a protective order was issued to maintain the confidentiality of materials submitted during the pretrial stage of the proceedings and to allow VWAG to move for *in camera* treatment of materials introduced into evidence, the German government has refused to transmit the documents until an *in camera* order is issued covering all of the documents regardless of their sensitivity. The German government has requested assurances that VWAG's materials will be afforded the same protections they would have in a German administrative proceeding: namely, that they will be kept confidential throughout the proceeding and returned to VWAG when the proceedings are complete.

The Commission has considered the certified motion and order, complaint counsel's arguments in favor of its motion and order, and the ALJ's recommendations for granting it, and it has determined that issuance of the certified order would be inconsistent with the Commission's rules in several important ways: First, it would not be based on the legal standard for issuance of *in camera* orders established in Commission decisions and reflected in its rules. Second, it seeks permanent and total protection, which is inconsistent with the public interest in making available as much as may be disclosed of the factual bases for Commission action. Third, certain provisions in the certified order are inconsistent with the Commission's obligation to disclose information to Congress. Fourth, the certified order includes no provision for discretionary information-sharing with state and other federal law enforcement agencies authorized by statute. Fifth, the certified order is inconsistent with certain requirements of the FTC Act, the FTC's rules and the Federal Records Act regarding return of materials submitted in FTC investigations. And last, the certified order requires destruction of documents in a manner that is unnecessary. The Commission has determined at this time not to issue an order modified to conform to what the Commission believes are the applicable statutes and rules, or to direct the parties to show cause why the certified order should not be modified. Instead, the Commission has determined to order the parties to establish a depository arrangement, on terms to be negotiated, whereby complaint counsel may examine the documents and information in question without the Commission's taking custody of the material. This procedure would enable staff to proceed expeditiously with the discovery portion of this case without the immediate need for issuance of an advance *in camera* order. After complaint counsel have examined the documents and determined which, if any, they plan to use in connection with their case or to introduce as evidence, the parties should reassess the need for *in camera* treatment and seek an appropriate *in camera* order from the ALJ, if warranted. The Commission's action here should not be considered a bar to renewal of the instant motion, whether or not in modified form, after completion of efforts in compliance with this order.

The Commission has carefully considered some of the issues this motion raises. The following discussion is intended to provide an explanation of the Commission's view of these issues that will guide the parties in the negotiations directed by this order. Any further motion for *in camera* protection, whether addressed to the ALJ or the Commission, should address the issues discussed below to the extent that they are relevant to the treatment sought.

A. *Advance In Camera Treatment*

At the outset, the Commission is troubled that the present motion seeks *in camera* treatment in advance of production of any documents, making virtually impossible adherence to the usual standard in Commission Rule 3.45. Rule 3.45 provides for *in camera* treatment of materials offered in evidence in ajudicative proceedings in "unusual and exceptional circumstances upon a showing of good cause." The rule provides in relevant part:

> Administrative law judges shall have authority but only in those unusual and exceptional circumstances where good cause is found on the record [*citing H.P. Hood & Sons*, 58 F.T.C. 1154 (1953)] to order documents or oral testimony offered in evidence, whether admitted or rejected, to be placed *in camera*.[1]

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[1] The rule further provides that the *in camera* order shall include: "(1) a description of the documents and (footnote cont'd)

Rule 3.45 has been construed to protect confidential documents which, if released, would cause a submitter clearly defined serious injury. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). In decisions following *Hood*, the Commission has held that an applicant for *in camera* treatment must make a clear showing that "the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury." *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). It has also construed the *in camera* standard strictly, taking into account the countervailing public interest favoring the disclosure of all information relevant to Commission decisions to permit both improved evaluation of the fairness and wisdom of a given decision and to provide clearer guidance to affected parties. *Tenneco, Inc.*, D. 9097 (September 10, 1981); *RSR Corp.*, 88 F.T.C. 206 (1976).

The first issue presented here was whether an *in camera* order should be issued under Rule 3.45 for reasons other than a showing of "clearly defined serious business injury": namely, to comply with the legal standards of a foreign government which that government has imposed as conditions for its transmitting through diplomatic channels documents responsive to discovery. In certain limited circumstances, good cause to issue an *in camera* order may be found under Rule 3.45 for reasons other than "clearly defined serious business injury" (*see e.g. Koscot Interplanetary*, D. 8888). We believe, however, that *in camera* treatment must be predicated on a finding that the submitter is likely to suffer harm from the absence of the protection. Moreover, if the projected harm does not meet the commercial injury standard reflected in the Commission's decisions in *H.P. Hood* and its progeny, it becomes doubly incumbent upon the parties to justify the need for the protection. Second, issuance of an *in camera* order before identifying the materials subject to the order would also be inconsistent with Rule 3.45(b)(1), which requires that an *in camera* order include a description of the documents and testimony to be excluded from the public record.

B. *Permanent In Camera Status*

The motion also seeks an order, in effect, making the *in camera* protection permanent. Specifically, paragraph 9 of the order attached to Complaint Counsel's motion provides that the *in camera* order may be modified, but only if the Government of Germany approves less restrictive treatment. This provision does not recognize that, at some point, materials placed *in camera* may no longer be sensitive and should be made available to the public if they form part of the basis

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testimony; (2) * * * the reasons for granting in camera treatment and (3) * * * the reasons for the date on which in camera treatment expires." *See* Commission Rule 3.45(b).

for agency action. Finally, issuance of a permanent *in camera* order would also be inconsistent with Rule 3.45(b)(3), which requires the *in camera* order to include a full statement of the reasons for the date on which the *in camera* treatment will expire.

C. *The Certified Order is Inconsistent With the FTC Act and Other Provisions of the Commission's Rules*

As already suggested, in addition to the legal problems posed under Rule 3.45 by an advance *in camera* procedure, the Commission believes that the certified order presents several other difficulties.

(1) Requirements of the FTC Act Regarding Disclosure of Information to Congress

The motion seeks an order specifying that VWAG documents be kept *in camera* throughout the entire proceeding and any related proceeding including an action brought to obtain consumer redress under Section 19 of the FTC Act. The Commission has no authority, however, to refuse to respond to official requests from Congress for access to information or documents. *See, e.g. Ashland Oil, Inc.* v. *FTC*, 409 F.Supp. 297 (D.D.C. 1976), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976). Its duties with respect to such requests are not altered by the confidentiality provisions of Section 21 of the FTC Act. *See* (15 U.S.C. 57b-2(b)(3)(C) and 57b-2(d)(1)(A)) or the Freedom of Information Act (5 U.S.C. 552(c)). Section 21(b)(3)(C), provides:

> Nothing in [Section 21] is intended to prevent disclosure to either House of the Congress or to any committee or subcommittee of the Congress * * *.

Further, Section 21(d)(1)(A) provides that the provisions of Section 21(c) (regarding protecting the confidentiality of submitted materials) shall not be construed to prohibit

> the disclosure of information to either House of the Congress or to any committee or subcommittee * * *.

These statutory provisions are reflected in Section 4.11(b) of the Commission's rules.

Paragraph two of complaint counsel's proposed order, which specifies the limited circumstances in which VWAG's *in camera* materials may be disclosed, fails to take account of the Commission's legal obligation to disclose information upon official request of Congress. Thus, even if the Commission were to issue an *in camera* order to protect VWAG's materials, that order could not legally prohibit the Commission from disclosing *in camera* materials to Congress upon receipt of an official request. Under both the statute and the rules, the Commission must notify a submitter of its receipt of such a request.

(2) Disclosure of Information to Federal and State Law Enforcement Agencies

The certified order also does not take account of the Commission's authority, at its discretion and under strict conditions of confidentiality, to share company-submitted materials with state and federal law enforcement agencies for official law enforcement purposes. Specifically, under Sections 6(f) and 21(b)(6) of the FTC Act, 57 U.S.C. 46(f) and 57b–2(b)(6), the Commission has discretion to respond to requests from state and federal agencies and to provide them access to confidential, company-submitted information

> upon the prior certification * * * that such information will be maintained in confidence and will be used only for official law enforcement purposes.

The Commission's procedures for responding to official requests from state and federal agencies are contained in Section 4.11(c) of the Commission's rules. The certified order does not address the issue whether *in camera* materials may be shared with federal and state agencies under the authority of Sections 6(f) and 21, and, therefore, it must be construed to preclude such action. Although the statute does not require the Commission to provide information to state and federal agencies as it does with respect to Congress, the Commission has engaged in such information-sharing routinely, and Section 4.6 of the Rules declares the practice to be a matter of Commission policy.

While the Commission may waive its discretion to share information with state and federal law enforcement agencies in particular instances, it is reluctant to issue a general waiver. A general waiver could place the Commission in the position of having to deny, without exception, all requests from such agencies as, for example, the Internal Revenue Service and the Department of Justice, or to deny state attorneys general access to information not readily obtainable in this country but not having any peculiarly sensitive financial or commercial significance. In addition, issuance of a general waiver based on factors such as the interest of a foreign government could create precedent from which departure could become increasingly difficult.[2]

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[2] There might also be pressure to extend the precedent as domestic firms seek a level of protection comparable to that enjoyed by companies with foreign connections. Two decisions following the 1980 amendments to the FTC Act resulted from company efforts to curb the Commission's information-sharing activities with state attorneys general: *Jaymar-Ruby Inc.* v. *FTC*, 496 F.Supp. 838 (N.D. Ind. 1980), *aff'd*, 651 F.2d 506 (7th Cir. 1981); *Flemming* v. *FTC*, CCH 1980–1 Trade Cas. ¶ 63642 (D.D.C. 1980), *aff'd*, 670 F.2d 311 (D.C. Cir. 1982), (also its companion case, *Milton Bradley, Inc.* v. *FTC*). These cases were preceded by *Interco, Inc.* v. *FTC*, 490 F.Supp. 39 (D.D.C. 1979), and *Martin Marietta Corp.* v. FTC, 475 F.Supp. 338 (D.D.C. 1979), *aff'd*, No. 79–1781 (D.C. Cir. May 27, 1980).

(3) Requirements Of The FTC Act Regarding Return of Originals and Copies Of Submitted Material

a. *Originals*

The motion also seeks an order providing that *in camera* documents, presumably originals, be returned at the end of the proceedings.[3] Two statutory provisions govern the Commission's authority to return documents obtained and used in connection with a law enforcement proceeding: First, Section 21(b)(5) of the FTC Act, 15 U.S.C. 57-2(b)(5), provides in relevant part:

> If any documentary material * * * [has] been produced in the course of any investigation * * * and
>
> (A) any proceeding arising out of the investigation has been completed
>
> * * * * * * *
>
> then the custodian shall, upon written request of the person who produced the material, return to the person any such material *which has not been received into the record of any such proceeding* * * *. (Emphasis added).

See also Commission rule 4.12(a).[4] Second, the Federal Records Act requires federal agencies to "make and preserve records [which reflect] the organization, functions, policies, *decisions,* procedures and essential transactions of the agency * * *." 44 U.S.C. 3301 (emphasis added). Accordingly, when a proceeding is complete, the FTC Act requires the Commission, upon receipt of a written request, to return all original documents produced in the course of the investigation *except* for materials placed in evidence and received into the record of the proceeding. Such materials provide the bases for Commission decisions and may not be returned to submitting parties pursuant to the Federal Records Act. *See* 44 U.S.C. 3101. Material placed *in camera* will be retained *in camera* pursuant to Rule 3.45(b).

The certified order provides for return of VWAG's documents stating that materials will be returned "to the degree permitted by the laws of the United States * * *." As will be discussed below, the order is too broad because it appears to cover copies of *in camera* documents generated by or on behalf of complaint counsel and it might also be read as extending to internal Commission documents generated by or on behalf of complaint counsel containing *in camera* information.

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[3] The motion does not distinguish between the return of originals and copies, but because the legal standards are somewhat different, we make that distinction here.

[4] Commission Rule 4.12(a) states in part:

> Any person who has submitted documentary material to the Commission * * * may obtain, on request, the return of material submitted to the Commission which has not been received into evidence * * *.

b. *Return Of Copies Of In Camera Materials*

Several provisions of the FTC Act and the Rules of Practice authorize the Commission to copy and retain copies of materials submitted in the course of its investigations. Under Section 21(b)(3)(B) of the FTC Act, 15 U.S.C. 57b-2(b)(3)(B), the custodian of submitted materials "may prepare such copies of the documentary material * * * as may be required for official use." Similarly, under Section 21(b)(5), 15 U.S.C. 57b-2(b)(5), the Commission is required to return materials not received into the record of a proceeding "other than *copies* of such materials made by the custodian * * *." (Emphasis added.) In addition to these provisions of the FTC Act, certain copies of documents must be maintained under the Federal Records Act if, as explained above, they are considered "appropriate for preservation." 44 U.S.C. 3301.

The requirements of the Federal Records Act are reflected in Commission Rule 4.12(c), which states that after a Commission proceeding is complete, Commission staff will

> examine all submitted documents and Commission-made copies * * * and will determine pursuant to the Federal Records Act, 44 U.S.C. § 3301, which documents are appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Commission because of the information value of data in them.

Thus, the Commission has no authority under the Federal Records Act to return all copies of documents which reflect certain decisions, procedures or transactions of the FTC.

As already explained, original documents that are made part of the administrative record may not be returned because of the Federal Records Act. If copies of the documents are introduced into evidence, perhaps to avoid permanent Commission custody of original documents such as contracts and the like, these copies must be retained. Finally, if copies of the materials or portions of information derived from them are incorporated into or attached to internal Commission documents such as memoranda recommending issuance of complaints in related matters or subsequent actions against VWAG for consumer redress, these copies too would have to be retained. Beyond these circumstances, however, the Federal Records Act and Rule 4.12(c) do not restrict the Commission's authority to return documents.

As already noted, the FTC Act provisions permit the Commission to make and retain copies. They do not, however, require that it do so. Nevertheless, the Commission has declared in Rule 4.12(b) that it

> will not return to the submitter copies of documents made by the Commission *unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.* (Emphasis added.)

The certified order does not address the issue of return of copies of VWAG's *in camera* materials. Copies are mentioned in the certified order only in Paragraph 5 which requires staff to "destroy personal copies of *in camera* documents and information * * * "[5] Presumably, this clause may be construed as prohibiting the Commission from retaining copies of VWAG's materials. The present case may yet present "extraordinary circumstances" within the meaning of Rule 4.12(b) under which the Commission may determine that it is in the public interest to return all copies of *in camera* documents except those which must be maintained under the Federal Records Act. The Commission, however, has long guarded its prerogative to retain copies of documents for use in future activities associated with its missions and not necessarily connected with the investigation or proceeding in which the documents were obtained. *See United States v. Morton Salt, Co.*, 338 U.S. 632 (1950).[6]

(4) Requirement for Destruction of Copies of Documents

The certified order requires complaint counsel to destroy all personal copies of *in camera* documents and information and mandates destruction of all notes, memoranda or other papers containing information derived from *in camera* materials. This provision is unnecessary. Assuming the Commission did issue an *in camera* order, any personal copies of *in camera* materials would be examined by staff after this proceeding is over and any related administrative or judicial actions and appeals are complete. Materials would be retained as required by the Federal Records Act pursuant to Commission Rule 4.12(c) or returned to VWAG under Commission Rule 4.12(b). Any *in camera* materials contained in notes or memoranda would be protected against disclosure under Exemption 3 of the FOIA, pursuant to Exemption 21(f) of the FTC Act and Rule 4.10(d), as explained above.[7]

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[5] *See* discussion *infra* at 15 regarding destruction of copies of documents.

[6] The certified order does not mention the protections of the Freedom of Information Act, 5 U.S.C. 552. The parties should note that under applicable laws and the Commission's rules, any originals or copies of *in camera* documents received into the record of a proceeding and any other copies required to be preserved in the Commission's custody under the Federal Records Act will be kept confidential and protected from disclosure under the FOIA. Specifically materials would be exempt from mandatory public disclosure under the Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3)(B), and Section 21(f) of the FTC Act, which states that materials received in an FTC investigation in response to compulsory process, or voluntarily in lieu thereof, shall be exempt under the FOIA. Although under the FOIA and Section 21(f), the Commission has discretion to make public materials that are simply exempt from mandatory disclosure, under Rule 4.10(d) of its rules, the Commission has waived this discretion for materials received in a law enforcement investigation that have been marked confidential by their submitter.

[7] Exemption 5 of FOIA also protects from disclosure staff's analysis of company submitted materials contained in notes and memoranda, but only to the extent the analysis does not reveal company-submitted information. Although it is Commission policy to favor discretionary release of such portions of internal memoranda after a file has been closed for three years, this policy is based on a rebuttable presumption that these materials are no longer sensitive, a presumption that might be inapplicable in the instant case.

D. *Modified Order*

As discussed above, the Commission believes that complaint counsel's motion and proposed order as certified present a number of problems. The Commission considered modifying the certified order so as to avoid inconsistencies with applicable laws and Commission rules, but it could not determine what objections might be raised to the modifications without affording the parties an opportunity to show cause why the order should not be modified. Following that procedure would further delay the proceedings in this case. Moreover, any advance *in camera* order would require the Commission to waive the requirements of Rule 3.45. Accordingly, the Commission determined to order the parties to enter a depository arrangement, on terms to be negotiated between them, whereby complaint counsel may examine the documents and information without the Commission's taking custody of VWAG's materials. The principal advantage to this procedure is that it will allow discovery to proceed, at least through an initial phase, without further delay.

Accordingly, *it is hereby ordered*, that:

1. Complaint counsel and counsel for VWAG enter a depository arrangement, on terms to be negotiated, whereby complaint counsel may view VWAG documents in possession of the German Foreign Office which are responsive to discovery in D. 9154 without prejudice to either party's right to petition for an *in camera* order for specific documents to be copied and taken into Commission custody and/or introduced into evidence;

2. In viewing the relevant documents, complaint counsel be permitted to take whatever notes are necessary to participate fully in the viewing of such materials and that such notes be withheld from public disclosure under Exemptions 3 and 5 of the FOIA, and not otherwise provided to persons outside the Commission except as required by the laws of the United States;

3. Except as provided herein or by order of the ALJ or the Commission, VWAG documents will not be photocopied or at any time taken into the custody and possession of the Commission;

4. Following the depository stage of discovery, complaint counsel and respondent shall designate whatever documents are to be copied, placed in the custody of the Commission and/or introduced into evidence; and

5. The documents designated pursuant to paragraph 4, or copies thereof, shall be delivered promptly to complaint counsel, but nothing in this order shall be read to preclude either party from seeking from the ALJ an appropriate *in camera* order for these documents that is consistent with United States law. Similarly, the ALJ is not precluded

from certifying further requests for extraordinary *in camera* protection to the Commission but is directed before doing so to require full briefing on issues discussed herein that are presented in such future requests.

IN THE MATTER OF

CHAMPION SPARK PLUG COMPANY

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9141. Complaint, July 29, 1980—Final Order, June 20, 1984

In this Final Order, the Commission denied appeals of respondent and complaint counsel, accepted the ALJ's Initial Decision and Order as its own, and dismissed the complaint charging a spark plug manufacturer with antitrust violations through its acquisition of The Anderson Company, the nation's largest manufacturer of replacement windshield wiper products.

Appearances

For the Commission: *Robert C. Jones*

For the respondent: *Alan Malasky, Arent, Fox, Kintner, Plotkin and Kahn,* Wash., D.C. and *Richard Kerger, Marshall, Melhorn, Cole, Hummer and Spitzer,* Toledo, Ohio.

COMPLAINT

The Federal Trade Commission, having reason to believe that Champion Spark Plug Company ("Champion"), a corporation subject to the jurisdiction of the Commission, has violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)(1)), through the acquisition of the stock of The Anderson Company ("Anco"), and that a proceeding by it in respect thereof is in the public interest, hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this Complaint, the following definitions shall apply:

(a) *Windshield wiper products* include all windshield wiper arms, blades and refills for application on automobiles, trucks and buses.

(b) The *replacement market* consists of all sales by manufacturers of motor vehicle parts for use in replacement of original equipment parts or previously replaced parts.

II. CHAMPION SPARK PLUG COMPANY

2. Respondent Champion is a corporation organized and doing business under the laws of the State of Delaware, with its principal executive office at 900 Upton Avenue, Toledo, Ohio.

3. Champion is the domestic and worldwide leader in the manufacture and distribution of automotive spark plugs for replacement use. [2]

4. In 1977, Champion's net sales were $569,430,356, and its net income was $49,632,517. As of December 31, 1977, Champion had total assets of $476,909,079.

5. A major portion of Champion's United States automotive spark plug replacement sales are made to warehouse distributors and jobbers.

6. In February 1977, Champion entered into the manufacture and sale of windshield wiper products through its acquisition of Arman S.p.A. of Turin, Italy. In 1977, Arman had total net sales of $16,997,100. The major portion of such sales was from the sale of windshield wiper products sold mostly in Europe, where Arman is a leading producer.

7. At all times relevant hereto, Champion sold and shipped products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

III. THE ANDERSON COMPANY

8. Anco is a corporation organized and existing under the laws of the State of Indiana, with its principal executive office at 1075 Grant Street, Gary, Indiana.

9. Anco's business consists primarily of the manufacture and distribution of windshield wiper products for virtually all domestic and foreign passenger automobiles.

10. In 1977, Anco's net sales were $54,247,130, and its net income was $2,255,977. As of December 31, 1977, Anco had total assets of $30,088,395.

11. A major portion of Anco's United States windshield wiper product replacement sales are made to warehouse distributors and jobbers.

12. At all times relevant hereto, Anco sold and shipped its products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. THE ACQUISITION

13. On May 17, 1978, by agreement dated May 15, 1978, with The John W. Anderson Foundation, Champion acquired approximately 94.4 percent of Anco's stock from the Foundation for $35,652,000 in cash. Thereafter, Champion acquired the remaining Anco stock from minority shareholders and all outstanding Anco stock options, bringing the total purchase price paid by Champion for Anco to $38,110,000. [3]

V. TRADE AND COMMERCE

14. The relevant geographic market is the United States as a whole.

15. The relevant product market is the manufacture and sale of windshield wiper products for the United States replacement market.

16. In 1977 and 1978, sales of windshield wiper products for the United States replacement market totalled approximately $47 and $62 million, respectively.

17. At the time of the acquisition, Anco was the leading firm in the manufacture and sale of windshield wiper products for the United States replacement market. In 1977 and 1978, Anco was the number one firm in sales of windshield wiper products for the United States replacement market, with approximately 43 and 40 percent, respectively, of total sales for that market.

18. Concentration in the manufacture and sale of windshield wiper products to the United States replacement market is substantial. At the time of the acquisition, the two largest sellers accounted for more than 78 percent of sales in the market; the four largest sellers accounted for more than 92 percent of such sales.

19. Barriers to entry into and to effective competition in the manufacture and sale of windshield wiper products for the United States replacement market are high.

VI. ACTUAL POTENTIAL COMPETITION

20. There is a reasonable probability that, but for the acquisition of Anco, Champion would have entered into the manufacture and sale of windshield wiper products to the United States replacement market either *de novo* or by acquisition of a toehold company, *i.e.,* a company with a relatively small share of the relevant product market.

VII. EFFECTS OF THE ACQUISITION

21. The effect of the acquisition of Anco by Champion may be substantially to lessen competition or to tend to create a monopoly in the manufacture or sale of windshield wiper products for the United

States replacement market, or any submarket thereof, throughout the United States in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others: [4]

(a) Potential competition between Champion and Anco and between Champion and other firms that manufacture and sell windshield wiper products for the replacement market has been eliminated;

(b) The potential for substantial deconcentration of the relevant market as a result of Champion's *de novo* or toehold entry has been eliminated; and

(c) Barriers to entry into or to effective competition in the relevant market may be raised.

VII. VIOLATIONS CHARGED

22. The acquisition of Anco by Champion constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

MAY 10, 1983

PRELIMINARY STATEMENT

The complaint in this matter, issued on July 29, 1980, alleged that Champion Spark Plug Company ("Champion") has violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act through the acquisition of The Anderson Company ("Anco"). The theory of the complaint is that, since Champion was already producing windshield wipers in Europe, there is a reasonable probability that, but for the acquisition of Anco, Champion would have entered into the manufacture and sale of windshield wiper products to the United States replacement market either *de novo* or by acquisition of a company with a relatively small market share. The effects of the acquisition are alleged in the following ways:

a. Potential competition between Champion and Anco and between Champion and other firms that manufacture and sell windshield wiper products for the replacement market has been eliminated;

b. The potential for substantial deconcentration of the relevant market as a result of Champion's *de novo* or toehold entry has been eliminated; and

c. Barriers to entry into or to effective competition in the relevant market may be raised.

Respondent generally denied the allegations of the complaint and specifically denied that the relevant product market is the manufacture and sale of windshield wiper products for the United States replacement market. Respondent argues that the product market should not include the sale of arms, nor sales to car manufacturers for resale to their dealers—known as the original equipment service ("OES") market.

After oral argument on the record, by order of October 5, 1981, I granted respondent's motion for a cut-off date of December 31, 1980 for discovery and record evidence.

After substantial discovery and pretrial motion practice, the administrative trial commenced on February 8, 1982 and, with several interruptions, concluded on September 24, 1982. The record includes 7419 pages of transcript containing the [2] testimony of 38 witnesses and 1,702 exhibits, including 24 depositions consisting of about 4,500 additional pages of transcript.

The findings of fact include references to supporting evidentiary items in the record. These references are intended to serve as guides to the testimony and the exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.

Abbreviations

(Abston 152)	– References to the transcript are designated by the name of the witness and followed by the page number.
(Oshei RX 4003J)	– References to depositions are designated by the name of the witness and followed by the exhibit number of the transcript of the deposition and the referenced page(s).
(CX)	– Complaint counsel's exhibit, followed by its number and the referenced page(s).
(RX)	– Respondent's exhibit, followed by its number and the referenced page(s).
(DIY)	– Do It Yourself—installation of product by consumer.
(OE)	– Original Equipment.
(OES)	– Sale of wipers to car manufacturers for resale to their dealers.
(OEM)	– Original Equipment Manufacturer.

(WDs) – Warehouse Distributors.
(F.) – Finding. [3]

I. FINDINGS OF FACT

A. *The Champion Spark Plug Company*

1. The Champion Spark Plug Company ("Champion") is a Delaware corporation with its principal offices in Toledo, Ohio. It is the leading manufacturer of automotive spark plugs for replacement use in the United States and world-wide. (Complaint ¶ 2; Answer ¶ 2).

2. In 1978 Champion had net sales of $692,611,371, net income of $55,293,642, and total assets of $580,133,169. (CX 979V, X).

3. The Champion Spark Plug Company was founded in Boston in 1907 by two brothers, Frank D. Stranahan and Robert A. Stranahan, and began manufacturing spark plugs in 1909 in a rented room above a laundry. (CX 610).

4. Responsibility for the day-to-day operation of Champion has been vested since 1971 in the executive committee consisting of Robert A. Stranahan, Jr., president and chairman of Champion, Robert J. Brotje, Jr., executive vice president and director of finance, and Richard E. Surface, executive vice president and director of operations. (Brotje CX 3011–I; Brotje 4450). However, final decisions are those of Mr. Stranahan. (Brotje CX 3011–O-P).

5. Until 1977 Champion's primary subsidiaries were the Baron Drawn Steel Company and the DeVilbiss Company. The Baron Drawn Steel Company was acquired by Champion in 1964. It is a supplier of cold-drawn steel bars and coils used by Champion in the manufacture of its spark plug shells, the portion of the spark plug which screws into the engine. (CX 610; Surface CX 3006Z–19). Its manufacturing facilities are located in Toledo, Ohio. (CX 985F).

6. The DeVilbiss Company was acquired by Champion in 1967. (Brotje 4553–54). It makes spray painting equipment (including guns, compressors, pumps, and ovens), painting robots, rubber hose for use in connection with compressors and spray guns, and certain medical equipment. (Surface CX 3006Z–22 – Z–23; Surface CX 3006Z–25 – Z–26; CX 66B–C).

7. In February 1977, Champion acquired Arman S.p.A. ("Arman") located in Durento, a suburb of Turin, Italy where it manufactures windshield wiper blades, refills and arms, and steering locks for sale primarily in Europe. (CX 20A–F; CX 129B). [4]

8. Shortly after the Arman acquisition, Champion began construction of a second wiper facility in Latour, Belgium (Cocchiglia 3987) that more than doubled Champion's overall wiper capacity. (CX

979M; CX 1337S–T). Champion broke ground for the Latour plant in late 1977 (Senez RX 4004Z–122) and, by the beginning of 1979, had begun producing wipers at Latour. (CX 721). Champion established the Latour plant as a separate corporation known as Archambel S.A. (Emrick RX 4000Z–6).

9. At all times relevant hereto, Champion sold and shipped products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended. (Complaint ¶ 7; Answer ¶ 7).

B. *The Anderson Company*

10. The Anderson Company ("Anco") is a Delaware corporation with its principal executive offices in Gary, Indiana. Its business consists primarily of manufacturing wipers for domestic and foreign passenger automobiles. (Complaint ¶ 8–9; Answer ¶ 8–9). The windshield products sold by Anco includes blades, refills, arms, washers, washer pumps, chemical windshield washer antifreeze and solvent and tubing for washer pumps. (CX 399D).

11. Anco is one of the two leading manufacturers of wipers both for OE and for replacement use in the United States (CX 2509A–B; CX 236A–B), and is the leading firm in the United States wiper replacement market. (CX 2509A–B; RX 5003A). In 1977, Anco's net sales were $54,274,130, its net income was $2,255,977, and it had total assets of $30,088,395. (Complaint ¶ 10; Answer ¶ 10).

12. Sales to the replacement wiper market accounted for 72% of Anco's 1977 sales. (CX 399D).

13. In 1977, about 80% of Anco's sales to the replacement market were to warehouse distributors ("WDs"). Anco also made replacement sales to oil companies, tire companies and mass merchants. (CX 399D).

14. In 1980, Anco's net sales of wiper products to the replacement market were $22.3 million and 19.6 million units. Anco's market share was 34.3% in units. (RX 5003A).

15. Prior to the acquisition, Anco's wiper products were sold to the automotive after-market through 70 salesman and 16 manufacturers representatives. (CX 399D). [5]

16. Anco's main production facility is in Gary, Indiana. It has 191,000 square feet. The other manufacturing location is in Valparaiso, Indiana. It has approximately 151,000 square feet for both manufacturing and research and development. (CX 399L–N).

17. Ownership of Anco was largely in the hands of the John W. Anderson Foundation, a trust established upon the death of the company founder in 1967 for charitable, education and related purposes.

The trustees were all directors of Anco. The trust owned 94% of the outstanding shares. (CX 399I).

18. At all times relevant hereto, Anco sold and shipped its products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended. (Complaint ¶ 12; Answer ¶ 12).

C. *The Acquisition*

19. In 1972, Mr. Surface wrote to Anco stating that Champion was interested in the company. Nothing occurred. (Surface CX 3005Z–65 – Z–66).

20. Early in 1977, Mr. Surface again wrote to Anco expressing interest in buying it. Mr. Surface was invited to a meeting with The Anderson Foundation about April or May 1977. Champion continued to study Anco through the summer and fall of 1977. (CX 70; CX 78–80; CX 84; CX 93–94; CX 115; Surface CX 3006Z–179 – Z–184).

21. In December 1977, Champion was told by the trustees of The Anderson Foundation that the foundation's stock would have to be sold to the highest bidder and that the bid would have to exceed net worth. (Surface CX 3005Z–165 – Z–166, Z–170; CX 138).

22. The decision of the trustees to sell the company was based upon changes in the tax laws which made a sale necessary. (CX 138A; CX 401A).

23. In January, 1978, Mr. Surface prepared a memorandum to Mr. Stranahan which compared the benefits to Champion of acquiring Anco versus entering the United States windshield wiper market, and urged that Champion should pay a "premium" price for Anco. He sent a copy of the memorandum to Mr. Brotje. (CX 157). [6]

24. A team of Champion personnel went to Anco in January of 1978. Based on their review Champion proceeded with a more detailed evaluation. (CX 169).

25. Champion's board of directors authorized Mr. Surface to bid $35 million for the Anco stock. The book value of Anco's assets was about $23 million. (CX 157A; CX 160A; Brotje CX 3011Z–103 – Z–104; CX 172A).

26. The Echlin Corporation and Neiman Industries, Inc. of France also bid for Anco. (Surface CX 3005Z–42 – Z–43; Surface CX 3006Z–171 – Z–175).

27. In the final round of bidding, Mr. Surface obtained permission from Champion's executive committee to exceed the board of directors' limit on the allowable bid by 2% to defeat a competing bid. The final bid by Champion was successful. (Brotje 4481–82).

28. On May 17, 1978, by agreement dated May 15, 1978 with the

John W. Anderson Foundation, Champion acquired approximately 94.4% of Anco's stock from the Foundation for $35,652,000 in cash. Thereafter, Champion acquired the remaining Anco stock from minority shareholders and all outstanding Anco stock options, bringing the total purchase price paid by Champion for Anco to $38,110,000. (Complaint ¶ 13; Answer ¶ 13).

D. *Arman S.p.A.*

29. In late 1974, Stefano Cocchiglia, then director of marketing for Champion's European operations, learned that an Italian windshield wiper company named Arman S.p.A. ("Arman") might be available for sale. (Cocchiglia 3969–70). Mr. Cocchiglia was told to pursue the possible acquisition. (Cocchiglia CX 3002Z–78 - Z–115).

30. Negotiations for Arman lasted off and on over a two year period. At three different times, the negotiations fell apart. (Brotje 4453–54; Surface CX 3006Z–14 - Z–15).

31. In the early part of 1976, Champion proposed to acquire Arman for approximately $6.1 million. The offer was refused and the negotiations broke down. (Surface CX 3006Z–93 - Z–95).

32. During 1976 Champion learned that the Paul Journee Company of France ("P.J.") was interested in the possibility of Champion's acquiring it. P.J. is the largest manufacturer of wipers in France. (Senez RX 4004Z–98). Mr. Surface was interested in acquiring both Arman and P.J. and using P.J.'s plant for export. (CX 40D). [7]

33. Mr. Surface and Mr. Senez, Champion's manager of European operations, studied the acquisition of P.J. (CX 40–42). In October of 1976, Mr. Surface visited P..J.'s plant in France. (CX 40A). Mr. Senez continued to urge the acquisition of P.J. after Champion acquired Arman, stating among other results that acquiring P.J. would eliminate a price competitor. (CX 72; CX 77). Champion continued its interest in acquiring P.J. until Champion acquired Anco. (CX 65C; CX 125).

34. In September 1976, Champion resumed negotiations with Arman. In a memorandum to Mr. Stranahan, Mr. Surface recounted the history of the negotiations noting that the price previously discussed by Champion had dropped from $9,400,000 to $4,000,000 with a variety of additional terms. (CX 44).

35. On February 16, 1977 the executive committee authorized Mr. Surface to make the acquisition of Arman for an amount not to exceed $5,000,000; on March 18, 1977 the board of directors approved the acquisition for a final price paid of $4,500,000. (Surface CX 3006Z–107; CX 57).

E. *The Latour Plant*

36. By September 1977, Arman was faced with a large volume of back orders and was operating at full capacity. (CX 96).

37. On May 16, 1977, Mr. Surface wrote to Mr. Stranahan and noted that Arman's production would fall short of Champion's estimated needs in Europe by 3,000,000 windshield wiper blades and that there was no room to increase production at Arman. (CX 65B–C).

38. In September, 1977, Mr. Surface reported to Mr. Stranahan that incoming business was about 76% ahead of the previous year at Arman, and that there were back orders for 5,000,000 blades and refills. (CX 96A; Surface CX 3006Z–117 - Z–119).

39. Champion personnel visited Ireland, Scotland, England and France to find potential plant sites. (CX 71A).

40. In return for Champion's agreement to employ about 450 persons in the depressed Latour area, the Province of Luxembourg in Belgium agreed to provide Champion with the land, the cost of the building, and the cost of the machinery for a new windshield wiper plant. The total amount of the grants was approximately $14,000,000. (Surface CX 3006Z–119 - Z–120). [8]

41. The decision to construct the windshield wiper facility at Latour was made by Champion on September 16, 1977. The resolution passed by the executive committee allowed formation of a company known as "Archambel," which would run the Belgian windshield wiper operations. (CX 99; Brotje 4466–67).

42. Ground was broken for the plant in November of 1977. (Surface CX 3006X - Y). The plant was constructed within the $14,000,000 subsidy provided by the Belgian government. (Surface CX 3006Z–141 to Z–144). It began production in January 1979. (CX 609D, CX 597D).

F. *Windshield Wiper System*

43. A windshield wiper system[1] includes wiper blades and refills, wiper arms, the wiper motor, and the transmission and pivots ("linkage") (Oshei RX 4003H): [9]

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[1] On many vehicles, the system also may include a windshield washer pump, water bottle, and hose. (Wilsterman 795–96).

DESCRIPTION OF TERMS USED

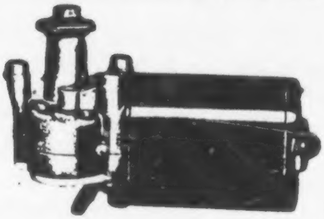

Figure 1. Windshield Wiper Motor (elec.)

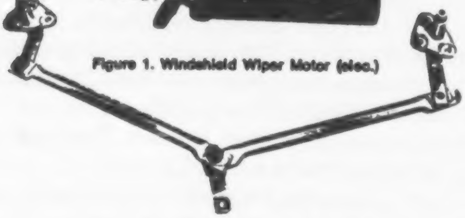

Figure 2. Windshield Wiper Transmission

Figure 3. Wiper Blade Refill

Figure 4.
Wiper Blade

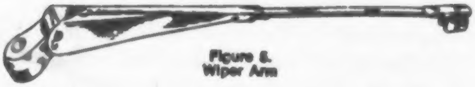

Figure 5.
Wiper Arm

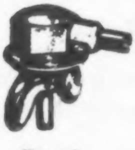

Figure 6.
Windshield
Washer Jet

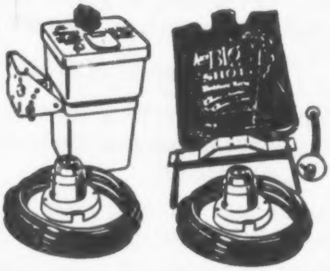

Figure 7.
Windshield Washer Reservoirs

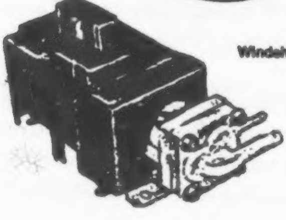

Figure 8.
Windshield
Washer Pump

CX 288C

[10] 44. The basic function of the windshield wiper system is to remove water from and to clean the exterior surface of the windshield. (CX 454Z–126; Stroh 54).

45. The windshield wiper blade is composed of the metal or plastic superstructure and the squeegee. On some blades, the squeegee is permanently set and not refillable. (CX 454Z–57, Z–65).

46. The "squeegee" or "element" is the rubber part of the windshield wiper system that directly touches the windshield. (Williams 872).

47. A windshield wiper refill is the combination of a wiper blade squeegee and the metal or plastic "flexor" or "vertebra" which backs the rubber element so that it may be attached to the wiper blade links. (Stroh 58–59).

48. The windshield wiper arm attaches the wiper blade to the drive system of the wiper motor via the linkage and applies pressure to the blade. (Stroh 54).

49. The windshield wiper transmission or linkage transmits the rotary motion of the electric wiper motor into the arc motion of the wiper arm. In 1980, only Trico and General Motors manufactured wiper linkage in the United States. (Stroh 50; Oshei RX 4003L–N; CPX 4).

50. The windshield wiper pivots tie together the linkage and the wiper arm. (Oshei RX 4003–J).

51. There are three basic types of connections for the arm to attach to the wiperblade. These are the pin-type, bayonet-type and the shepherd's crook. The shepherd's crook connector is commonly used on imported automobiles. (Stroh 97–98; CX 454Z–74, Z–78).

52. It is usually possible through use of adaptors to make the same blade attachable to each of the varieties of arms. (Stroh 98–99).

53. A windshield wiper blade bridge is affixed directly to the connector at the bridge's center. Each end of the bridge is attached to a link. The links attach to the flexor which holds the rubber windshield wiping element. The arm is attached to the connector and a spring system applies pressure downward on the blade. (Harbison 3527–28).

54. Many WDs carry windshield wiper linkage. (Campbell 1121; Peterson 954; Sullivan 311–12; Abston 167). [11]

55. Almost all cars now use electric wiper motors. No domestic windshield wiper producer manufacturers wiper motors. (Sullivan 316; CX 454Z–49 – Z–50).

56. Wiper motors and linkage seldom need repair or replacement and generally are original equipment and crash parts. (CX 454Z–50).

57. The "universal" refill is made also to fit blades made by other manufacturers and usually comes in only a few sizes, like 15", 16", and 18". (CX 454Z–86).

58. A "universal" blade will fit a variety of cars, foreign and domestic. (Sullivan 322–24).

59. A "short line" of wipers has about three to eight sizes that will fit most cars. (CX 1543Q).

G. *The Relevant Market*

60. The relevant geographic market is the United States. (Complaint ¶ 14; Answer ¶ 14).

61. The parties agree that the relevant product market includes the sale of wiper blades and refills ("wipers") to the replacement market and does not include sales of wipers to automobile manufacturers for installation in vehicles as OE. The parties also agree that imported products should be included and exports should be excluded from the market.

62. Anco and Trico make and sell arms. (CX 993; CX 1753E). In 1980 Robert Bosch started to sell arms. (CX 1495B). While it sold wipers, Gates sold arms. (Williams 878). The other companies in the windshield wiper industry have not carried arms. Nefco, Tridon, Fram and Ideal have all sold wipers to WDs without carrying arms. (Nelson 6492–93). In 1980, Tridon was planning to assemble and sell arms for two models of an OE customer. (CX 1887E).

63. In 1977, Nefco considered distributing arms made by a Brazilian manufacturer. (CX 373). Tridon has considered assembling arms from parts made by other companies. (CX 1990C). AMC Jeep buys arms from Trico and blades from Tridon. (CX 631B).

64. In 1980 Trico's sales of blades and refills to seven national oil companies were about $2.5 million; its sales of arms to those companies were $715. (Nelson 6492–95). [12]

65. Atlas, representing 25,000 service stations, is one of the largest customers for, and is the third largest seller, behind Anco and Trico, of replacement wipers. In 1979, Atlas discontinued sale of the last arm in its line, since it felt that sales of arms in service stations had limited potential. (CX 825C; CX 1014Z–17; CX 801).

66. Anco manufactures arms primarily to fulfill the OE demand rather than for their sales potential in the aftermarket. (CX 650J).

67. The price of arms does not necessarily follow the price for blades and refills. (RX 125A, RX 132C, RX 149B, RX 213).

68. The equipment and tooling used to make wiper arms is different from that used to produce blades and refills. (CX 283G).

69. Most WDs and jobbers carry arms, although in diminishing numbers, and it is not necessary for them to do so. (CX 1054B; Abston 165, 181–82). Replacement arms are usually installed by a car dealer who is supplied with OES arms by the car manufacturer. (Abston 181).

Mass merchants do not carry wiper arms. (Abston 165, 212–13; Sullivan 310–11; Frank 2575).

70. In 1980, about 4% of total net unit sales of arms in the United States went to the replacement market and 96% went to OE (RX 5002); arms were about 2% of total units of wipers sold in the aftermarket. (RX 5000–02; CX 2510A).

71. Most windshield wiper arms sold in the automotive aftermarket are for crash or theft replacement. (Abston 181, 278; Lindeen 2741; Schwalbe 4379). They do not wear out like a windshield wiper blade or refill. (Sullivan 416). Windshield wiper arms are designed to last the life of the automobile. (George 789; Stroh 105; Campbell 1143). The sale of arms to the replacement market has been steadily dropping for many years. (CX 1014H).

72. The sale by wiper manufacturers of replacement wipers to car manufacturers for resale to their dealers is known as original equipment service ("OES"). (CX 1003Z–85).

73. A wiper manufacturer must be approved as an OE supplier before car manufacturers will buy its OES wipers for resale to dealers. (Singleton 3480; Longman 687–88). [13]

74. The supplier of wipers for OE will generally sell OES to the same OEM. (CX 1003Z–85). If a car manufacturer has approved two windshield wiper manufacturers as OE suppliers, either may supply OES. (Nelson 6453–54).

75. Consumers sometimes have replacement wipers installed by car dealers. (Schwalbe 4436).

76. Anco internal planning documents refer to OES sales as being in the "replacement" market, and separate from OE sales. (CX 935D–E; CX 870C–E; CX 454H–I; CX 399D).

77. A General Motors automobile dealer sells for OES the same blade that was tested by Fisher Body as OE. (Wilstermann 824).

78. Ford-brand wipers, which must meet the same standards as blades used by Ford as OE installation, are sold only to Ford dealers. Ford products sold to the aftermarket, branded as Motorcraft, do not have to meet OE standards. (Mitzel 450, 474–77).

79. Ford Motor Company dealers purchased Ford-branded OES wipers primarily for warranty applications. (Mitzel 453).

80. Wiper sales by new car dealers often occur while the car is in the shop for warranty repair. (Abston 216; Cohn 2407–08).

81. Since the OES blade is the same as the OE blade and is normally a different blade than blades sold to the replacement market, its price is based on the OE price obtained by the wiper manufacturer, rather than the price of replacement blades sold to WDs. (CX 755A; CX 901; CX 938A; Surface CX 3005Z–166).

82. Anco maintains a separate sales staff to sell wipers to automo-

bile manufacturers for both OE installation and for OES. The OE sales office is located in Detroit. (Regan CX 3008Z).

83. Anco's OE sales force is separate from both Champion's OE spark plug sales force and the aftermarket sales force for wipers and spark plugs. (Regan CX 3008Z–3).

84. The director of aftermarket sales for the Trico Products Corporation is responsible for Trico's sales to the entire aftermarket. (Sullivan RX 4005L–M). Trico's sales of windshield wipers for OES and OE installation are handled through a separate Trico sales office in Detroit, and Trico's director of aftermarket sales is not responsible for those sales. (Sullivan 409–10; Sullivan RX 4005–O–P). [14]

85. Trico's OE installation and service salesmen in Detroit do not sell Trico products to any aftermarket accounts. (Oshei CX 3013Z–9).

86. Different departments in the Robert Bosch Sales Corporation sell automotive products to the independent replacement market and for OES. (Heinemann CX 3003Z–21 - Z–23).

87. The A.C. Delco Division of General Motors sells automotive products to the aftermarket. A different organization, General Motors Parts Division, sells parts to dealers for OES. Only the A.C. Delco Division sells parts to WDs. (George 744, 746).

88. New car dealers are often also in the used car business. If a General Motors dealer has a Chrysler taken in trade, which needs replacement wipers, the dealer will probably go to a jobber to get those parts. (Sullivan 340).

89. In 1980, total OES sales of windshield wiper blades and refills were 5.8% of total net unit replacement sales of windshield wiper blades and refills in the United States. (RX 5000–01).

90. The relevant product market is the manufacture and sale of windshield wipers to the U.S. replacement market. The relevant product market does not include arms or OES wiper sales.

H. *Windshield Wiper Manufacturers*

1. Trico Products Corporation

91. The Trico Products Corporation ("Trico"), headquartered in Buffalo, New York, manufactures windshield wiper motors, arms, blades, refills, linkage mechanisms, washers and cleaning solutions and related products. Trico sells its products to OEM and to the aftermarket through WDs, jobbers, and retail outlets, including oil companies, tire companies and other chain accounts in the United States and Canada. (RX 1020B).

92. In 1978, Trico had sales from domestic operations of about $133 million, with income of about $10 million. (CX 1754S). In 1979, Trico had about 4,400 employees. (CX 1754C).

93. Trico was founded in 1917 by a group of investors, including the father of Trico's present chairman. Trico's original windshield wiper had to be manually operated by the vehicle driver. In 1922, Trico developed and produced a vacuum [15] wiper motor. Later, Trico introduced the windshield washer system that became standard equipment on motor vehicles. (Oshei CX 3013N–P).

94. Trico's Buffalo facilities include three manufacturing plants with floor space of 1.8 million square feet and an engineering building of 70,000 square feet. In addition, Trico has sales office space in Detroit and assembly facilities in Fort Eire, Ontario. (RX 1020C).

95. Trico's net sales of wipers to the replacement market in 1980 were $14.2 million and 14.2 million units. Trico is the number two firm in the domestic wiper replacement market. In 1980, Trico's market share was 24.8% in units. (RX 5003A; RX 5004).

96. Trico has been the leading seller of wipers for the OE market. (CX 236A; CX 238A; CX 669A). In 1978 about 78% of its unit wiper sales were for OE. (CX 1712E–G).

97. In the first ten months of 1980, 43.1% of Trico's replacement sales were to WDs, 22.2% to one program distributor, National Automotive Parts Association ("NAPA"), 16.8% to oil companies and 17.9% to mass merchants. (CX 1789U).

98. Before 1980 Trico had a direct aftermarket sales force of 17 zone managers and 35 area managers who called on jobbers on a regular basis. (Sullivan RX 4005H–I; CX 1712J). At the end of 1980, Trico began to change from a salaried direct sales force to manufacturers representatives due to the high expense of its salaried sales force. (Oshei RX 4003Z–88; CX 1789K–L; Sullivan RX 4005H, Z–170).

99. About half of Trico's wiper sales to the replacement market are private brand. (CX 1789U).

2. Tridon, Ltd.

100. Tridon, Ltd. ("Tridon") is a Canadian corporation founded in 1924 and makes hoses, windshield wipers, clamps, flashers and other products for automobiles. (CX 2043S, V).

101. Tridon had sales of about $44 million in 1978. (CX 1873D). Tridon employed 1600 people in that year. (CX 2043F).

102. Tridon was the first producer of a plastic windshield wiper blade which it started to sell in Canada in 1970. (CX 2043B; CX 264C; CX 3012Z–203; CX 1899B). A new plant in Oakville, Ontario was officially opened in October 1980 for the [16] production of wiper blades. It is a technologically sophisticated wiper blade plant giving Tridon a cost advantage. (Shelton CX 3012W–X).

103. Tridon's wipers are sold in Canada, the United States, Japan,

Australia, Austria, England, France, Denmark and Sweden. (Sheldon CX 3012).

104. Tridon opened a plant in Smyrna, Tennessee in 1978 where it assembles wipers. The components are made in the Oakville plant and shipped to Smyrna for assembly. (Sheldon CX 3012Z–204; CX 2043V). Tridon's wiper blade and refill capacity in 1980 was 21.6 million units. (CX 2011–I).

105. Tridon sells wipers to OEM and the automobile aftermarket. (CX 3012X–Y).

106. For the first nine months of 1980, 37% of Tridon's wiper dollar sales in the United States were to WDs and about 35% were sold through mass merchants. (CX 1894A; CX 2011H).

107. About 1971, Tridon manufactured wiper blades and refills for sale in the United States by the Gates Rubber Company under the Gates brand to WDs. Tridon also started selling its own wipers in the United States under the brand name Storm Chasers to mass marketers, using manufacturers representatives. After quality problems, sales efforts in the United States by both Gates and Tridon ceased about 1975. During 1976 and until 1977, Tridon did not actively attempt to sell wiper products in the United States. (Shelton CX 3012N–P, Z–199 - Z–200). In 1976, Tridon's total wiper sales were $38,867. (RX 5022).

108. In 1977, after a three year research program, Tridon again entered the U.S. wiper market, gained OE approval at Ford, and started selling its short line, plastic blade in the replacement market. (CX 2001C; Shelton CX 3012N–P).

109. By 1981, Tridon OE wipers were to be used for almost all of the production of passenger cars by Ford (CX 2103A, CX 2043B, CX 1887A), 100% of Volkswagen of America, American Motors/Jeep and International Harvester, two models of GM cars, and 30% of the OE business of Toyota, Subaru and Fiat. (CX 2103A). Tridon forecast its OEM volume at over 5 million blades for 1981. (CX 1887A).

110. In 1980, Tridon was planning to start assembling windshield wiper arms for two models of an OE customer. Tridon had requested quotations from various vendors to supply parts, [17] with final assembly of the arms to be done in-house. (CX 1887E).

111. The Tridon blade was the first plastic windshield wiper approved for OE. (CX 2043B). It is a short line of wipers, only 6 blades fitting virtually every car. (CX 2043B; CX 2104; CX 2124A). The Tridon plastic is a fiberglass polyester. The plastic blades made by Fram, Roberk and Nefco are made of polymide, a different molecular structure. (Shelton CX 3012Z–213 - Z–214).

112. Tridon spent $126,000 for promotion and advertising to the

U.S. replacement market in 1973; $23,000 in 1974; less than $5,000 annually in 1975–78; and $60,000 in 1979. (CX 1873C–D).

113. By 1980 Tridon was selling wipers in the U.S. through about 15 manufacturer representative agencies. (Shelton CX 3012Z–38).

114. In 1980, Tridon's replacement market net sales of wipers were $830,000 and 1.1 million units with a market share of 2% in units. (RX 5003A; RX 5004).

3. Pylon Manufacturing Corporation

115. Pylon Manufacturing Corporation was established by the founders of Lee Filters in 1968 and sold to STP in 1969. (Longman 503–04). In 1974, Rodney Longman acquired the stock of Pylon from STP for $550,000, a part of which came from a loan to Mr. Longman from the Small Business Administration. (Longman 486, 690). Pylon sells windshield wiper blades, refills, washer pumps, tubing, and wiper delays. (CX 1646–B).

116. Pylon's sales effort has been directed primarily to the mass merchant channel of the replacement market. (Longman 535). Pylon uses manufacturers representatives to market its replacement wiper line. (Longman 520–22, 617). Pylon has never sold wipers for the OE market. (Longman 605–06).

117. Pylon's net sales of wipers in 1980 were $3.5 million and 6.2 million units. Pylon has been the number four firm in the market since at least 1975, with a 1980 market share of 10.9% in units. (RX 5003A; RX 5004).

118. Pylon is a light assembler, owning tools and dyes and having some parts made by outside sources. (Longman 489, 607). [18]

119. In 1978, 38% of Pylon's sales were to automotive chain stores, 39% to discount chains, 12% to feeders, 7% to jobbers and 3% to oil companies. In 1979, 23% of Pylon's sales were to automotive chain stores, 41% to discount chains, 11% to feeders, 9% to jobbers, and 7% to oil companies. In 1980, 15% of Pylon's sales were to automotive chain stores, 61% to discount stores, 10% to feeders, 8% to jobbers, and 1% to oil companies. (CX 1634E; CX 1637C).

4. Parker-Hannifin Corporation

120. Roberk is a division of Parker-Hannifin Corporation's ("Parker-Hannifin") Automotive Aftermarket Group. The Ideal Corporation is a Parker-Hannifin subsidiary. Both Roberk and Ideal make and sell wiper products. (Lopez CX 3000D).

121. Parker-Hannifin is a large diversified corporation. (RX 873B). Parker-Hannifin employed over 20,000 people in 1979. (RX 873G).

122. Parker-Hannifin's net sales in fiscal 1979 were $846 million. (RX 873D). Approximately 20% of Parker-Hannifin's net sales are

automotive. (RX 873B). The total assets of Parker-Hannifin at the end of June 1979 were $562 million. (RX 873D)

5. Roberk

123. In the 1960's Roberk was a manufacturer of mirrors for the automotive aftermarket. It purchased or subcontracted the manufacture of many parts. Its basic equipment was for stamping, drilling, tapping, bending, finishing and assembly and packaging. (Lopez CX 3000F–K).

124. Roberk developed an automotive safety belt, a hazard light warning switch, a line of small truck mirrors and a line of antennas. (Lopez CX 3000K–N).

125. Late in 1969, Roberk decided to start manufacturing wipers and by the end of 1970 it had produced its first refill. (Lopez CX 3000–O).

126. The capital cost to Roberk to start assembling wiper refills was about $100,000. (Lopez CX 3000P).

127. Roberk's entry into the windshield wiper market by selling to mass merchants was successful from the beginning. (Lopez CX 3000Z–4 - Z–5).

128. When Roberk entered the windshield wiper business, it did so as an assembler, not as a basic manufacturer. (Longman 492–93). [19]

129. Roberk added a line of blades about 1972. (Longman 511).

130. When Roberk started selling refills to mass merchants, Anco did not sell to mass merchants, except Sears and Penneys which it sold to under fair trade resale price maintenance contracts. (CX 1014J, N; Longman 501).

131. Roberk's sales effort resulted in sales to virtually every mass merchant except Sears and almost every red front. (Longman 516–17). (A "red front" is a retail auto parts store like Pep Boys.) (Longman 497).

132. In 1971, Roberk attempted to sell refills to WDs but failed, primarily because of quality problems. The universal line concept was well accepted. (CX 1544A; CX 1543Q).

133. In 1975, Roberk again tried to sell refills to the WDs but failed primarily because of the poor quality reputation of the Roberk product. Price discounting by Anco and Nefco was also a factor. (CX 1543U, Q; CX 1554A; Frank 2579, 2611).

134. In 1972, Roberk was acquired by Parker-Hannifin and Roberk is now a division of that company. (CX 1570D) Roberk uses manufacturers representatives to market its replacement wiper. (Lopez CX 3000Z–4). Roberk has never sold wipers for the OE market. (Lopez CX 3000Z–68).

135. Roberk's net sales of wipers in 1980 were $5.3 million and 10.8

million units. Roberk is the number three firm in the replacement market. Roberk's 1980 market share was 18.8% in units. (RX 5003A; RX 5004).

6. Ideal Corporation

136. Ideal Corporation ("Ideal") was acquired by Parker-Hannifin during the early 1970's. (CX 1563G). Ideal manufactured hose clamps, flashers and thermostets. (RX 698C).

137. In 1977, Ideal began to plan entry into the windshield wiper business. It perceived an opportunity in selling a secondary line of wipers offered to the traditional market to complement an existing line. (CX 1542B).

138. Ideal felt that there were two markets for replacement sales, traditional and mass merchants; that each market had primary lines which were Anco and Trico; and that there was room **[20]** for a secondary or promotional line in each market. Roberk had been successful in taking the mass merchant market from the primary lines, and Ideal wanted to do the same in the traditional market. (CX 1542).

139. Ideal concluded that its initial entry into the windshield wiper market would entail promotion by free goods and discounts. (CX 1542H). Its total budget for advertising and promotional expenditures in 1979 for wipers was $73,200. (CX 1554B).

140. Ideal began selling refills in 1979. It suffered $24,000 in losses which it believed were attributable to short-term start-up costs. (CX 1532A; CX 1542B). In 1979 Ideal spent about $20,000 to advertise its refills. (CX 1532B; RX 688F). In 1980 Ideal did no advertising. (CX 2098Z–31; CX 1572E).

141. Ideal sells through manufacturers representatives to jobbers. (CX 1532B; CX 1573A). It does not sell wipers to the OE market. (CX 1531A).

142. Although it fit 88% of all registered cars, the Ideal "universal" refill with its steel flexor, would not fit plastic blades sold by Roberk, Fram, Pylon and Tridon and some of the OE blades sold by Anco and Trico. (CX 1573).

143. As a result of a confusing array of blades being sold in 1980, some of which were not refillable, jobbers and dealers were replacing blades entirely rather than replacing the element in a worn blade with a refill. (CX 1573B).

144. In 1980 Ideal therefore planned to start making blades. (CX 1573Y).

145. Ideal's total investment was $142,000, which enabled it to acquire slitters, tooling, molds used by outside rubber vendors, pack tables, assembly machines, cutting machines and clip dies. (CX 1572D).

146. In 1980 Ideal sold 966,469 refills for $482,465. (CX 1542C). Its market share was 1.7% in units. (RX 5003A; RX 5004).

7. Fram Corporation

147. The Fram Corporation ("Fram") is owned by the Bendix Corporation. (Slight 6562). [21]

148. The Bendix Corporation and consolidated subsidiaries, including Fram, had net sales and other operating revenues in 1980 of $3.9 billion, and net income of $191.6 million. (RX 270C).

149. The automotive segment of the Bendix Corporation accounted for over half of the corporation's total revenues in 1980 ($2 billion) and 25.3% of the corporation's net income. (RX 270C).

150. Fram manufactures and sells automotive filters, spark plugs and windshield wipers. Fram manufactures windshield wipers primarily as an assembly process. (Slight 6561).

151. Fram entered the windshield wiper market in 1972 by offering a short line of plastic blades. It offered promotion, advertising, marketing expertise and the same sales force of more than 200 used to market its other automotive replacement products. (Slight 6575, 6582; CX 1445B).

152. Fram sells wipers to WDs, feeder warehouses and mass merchandisers. (Slight 6582; CX 1014L). Fram tried to sell wipers to Chrysler about 1977 but was unsuccessful primarily because its price was too high. (Slight 6581; CX 1193B).

153. Soon after it was introduced Fram had quality problems with its product. The blades broke because its supplier had provided plastic made with an incorrect formula and the design of the blades was deficient. (Slight 6571–79). Also, an employee in Fram's rubber supplier improperly mixed the rubber compound, causing a defect in the rubber elements. (Slight 6576–77).

154. The problems which troubled Fram in the early 1970's were solved before 1978. (Slight 6571–77).

155. Fram's net sales of wipers in 1980 were $1.2 million and 1.9 million units and Frams's market share was 3.2% in units. (RX 5003A; RX 5004).

8. Robert Bosch, GmbH

156. Robert Bosch, GmbH ("Bosch"), of Stuttgart, West Germany, is a major supplier of automotive parts throughout the world. 1980 worldwide sales of Bosch were over six billion dollars. Over half of that amount was sales in the automotive field. (Fiene CX 3001Z–21 – Z–22; Heinemann CX 3003D–G).

157. In Europe, Bosch manufactures and sells OE to Volkswagen-

Audi, Daimler-Benz, BMW, Ford, Opel, Renault, Citroen, Volvo and Saab. (Gillberg 3933). [22]

158. Among the many automotive parts made by Bosch in Europe are windshield wiper motors, arms, blades, refills and clips. Each of those products is also sold in the United States. (Heinemann CX 3003W).

159. Bosch windshield wiper arms are manufactured in a plant in Germany; its blades and refills are manufactured in Belgium. (Heinemann CX 3003W–X).

160. Bosch's sales subsidiary in the United States is a substantial supplier of automotive parts including spark plugs, ignition parts, filters, fuel injection parts wire and cable, carburetor kits and wipers. Its net sales in 1980 were $295 million with net income of about $7 million. (CX 1491G; CX 1502B; CX 1504B; CX 1487–88; CX 1492).

161. Bosch's wiper plant was built in Belgium. It took more than 3 years to build and 6 years before it turned a net operating profit. By 1980 it employed 900 workers, was highly profitable, and had an annual capacity of 32 million blades. (CX 919R; CX 924B; Gillberg 3933).

162. Bosch's wiper line for the U.S. replacement market primarily covers vehicles imported into the U.S. from Europe for which Bosch is the OE supplier. In 1980 Bosch was planning to expand that coverage to include cars imported from Japan. (Heinemann CX 3003Z–136 - Z–137).

163. Bosch's automotive replacement parts sales are directed at WDs and OES (Fiene CX 3001Y) and are handled by 75 salesmen. (Heinemann CX 3003Z–152).

164. Bosch spent no money on advertising or promotions of wipers during 1976 through 1979. (CX 1490B; CX 2097N).

165. Bosch's 1980 net sales of wipers to the U.S. replacement market were $613,000 and 701,000 units, with a market share of 1.2% in units. (RX 5003A; RX 5004).

166. Bosch is a supplier of automotive parts including spark plugs, filters, fuses and electrical equipment, for OE in the United States. Its customers include General Motors, Ford, Chrysler, and Volkswagen of America. (Fiene CX 3001W, Z–77, Z–28). [23]

9. Nefco

167. Neff-Perkins Company is a precision rubber molder. (Neff 834–5). In 1973 the Nefco division decided to enter the wiper business; it was making refills by 1975 and blades by 1978. (Neff 838).

168. In January 1979 the Nefco division of Neff-Perkins was sold to Neiman Industries. Neiman is the largest windshield wiper manufacturer in France, selling under the name "Paul Journee." (Neff 837,

858–59). Neiman also manufactures automotive horns in the United States. (Neff 837).

169. Neiman has sales over $100 million and sales of wipers in France of $15 million to $18 million. (Neff 853–54).

170. Nefco, now a division of Neiman Industries, is located in Cadillac, Michigan. (RX 902B). On January 1, 1981 Neiman Industries, Inc. was merged into the Signaltone Corporation. (RX 906K).

171. Neff-Perkins molded the rubber for Nefco and continued to do so after the acquisition by Neiman. (Neff 840–41, 836–37). Nefco subcontracted out the manufacture of the wiper superstructures. (Neff 844).

172. Nefco sells primarily to WDs and jobbers, using manufacturers representatives and three direct salesmen. (Neff 848, 851). Former Anco managers run the operation. (CX 1544B).

173. Nefco's net sales of wipers in 1980 were $1.3 million and 1.7 million units. Its market share was 3% in units. (RX 5003A; RX 5004).

10. Gates Rubber Company

174. Gates Rubber Company ("Gates") is a manufacturer of products for automotive and industrial purposes, such as fan belts, radiator hose, hydraulic hose and V-belts, thermostats, radiator caps, gas caps, hose clamps and hydraulic couplings. (Williams 864–65).

175. Gates sells its automotive products to WDs and vehicle manufacturers and has more than 200 salesmen. (Williams 865–66).

176. Gates began manufacturing rubber squeegees for Tridon starting about 1971. (Williams 872). In 1972, Tridon and Gates entered a joint venture under which Tridon would supply Gates with Gates branded wipers. (CX 1909B). Gates manufactured the [24] squeegees and supplied them to Tridon, which would split the squeegees and put them into the other components, package them and sell them back to Gates for distribution. (Williams 876). Gates wanted eventually to manufacture its own wiper. (Williams 925).

177. Two to three years after Gates entered the windshield wiper market, it had obtained business from several thousand automotive parts dealers. Gates considered that it was at or above its sales target for the product. (Williams 937–38).

178. During the 1960's Anco and Trico limited the number of WD they would sell wipers to. (Williams 873–75). Many of Gates WDs customers asked Gates to supply wipers. (Williams 872–73).

179. Gates sold the wipers to WDs, and then contacted the jobber customers of the WDs, and finally the dealer customers of the jobbers, urging them to buy the Gates wiper. (Williams 881).

180. The Tridon product sold by Gates under the Gates label had a poor fit and its blades broke. The refill clips also broke and the

squeegee fell out of its backing. The refill also did not fit an Anco blade. (Williams 883–84).

181. About 1975, Gates pulled out of the windshield wiper business. There were three reasons for the decision: the poor Tridon product; the failure of Gates' own research and development people to develop an all-plastic product without use of any metal manufacturing; and price competition. (Williams 897–98).

11. Other Entrants

182. Damin Company ("Damin") started marketing universal refills in early 1969 to red fronts and discount houses, but failed shortly thereafter. (CX 263A–B, CX 1003Z–81; CX 1587A; Longman 506). About this time, several others including Camel, Comstock, Yankee and Hastings tried to sell refills and also quickly failed. These refills had quality problems and would not adequately fit in Anco and Trico blades. (CX 1544A; CX 263A–B). IT&T imported SWF wipers in 1976–77 but was driven out by price competition by other imported wipers. (Gillberg 3927–29). [25]

I. *Sales and Concentration Ratios*

183. The following table[2] sets forth, for each wiper manufacturer, the net unit sales of windshield wiper blades and refills to United States aftermarket accounts, from 1975 through 1980, and the percentage of such sales held by each such manufacturer in each of those years: [26]

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[2] Other than data for Tridon and Bosch, neither complaint counsel's market share exhibits (CX 2509A–B) nor respondent's corresponding exhibits (RX 5003A; RX 5004A) include unit or dollar sales in the United States of numerous windshield wiper blades and refills manufactured abroad and imported into this country. (Cohn 2398–99). Accordingly, the market shares shown on the exhibits in the record are overstated. (Jacobs 2950–53).

Net Unit Sales of Windshield Wiper Blades and Refills
to United States Independent Aftermarket Accounts, By Manufacturer: 1975-80

Net Unit Sales*

Year	Anco	Trico	Tridon	Roberk	Fram	Pylon	Ideal	Nefco	Bosch	Total
1975	22,861,987	16,059,958	53,305	5,557,058	1,262,000	2,839,221	—	1,822,000	292,000	50,747,529
1976	22,228,882	15,363,289	95,992	5,961,845	1,716,000	3,440,000	—	2,012,160	317,000	51,136,104
1977	21,058,802	16,543,840	155,821	6,712,118	2,039,000	4,142,285	—	2,259,874	388,000	53,229,740
1978	28,059,849	19,883,259	85,125	10,553,343	2,469,000	5,813,675	—	3,049,143	1,060,000	70,973,394
1979	23,903,331	17,479,471	119,020	12,091,534	2,593,000	6,974,555	778,000	2,563,517	957,000	67,459,428
1980	19,574,842	14,151,150	1,148,700	10,773,128	1,871,000	6,197,650	966,496	1,687,103	701,000	57,031,069

Percent of Total Net Unit Sales of Windshield Wiper Blades and Refills to Aftermarket Accounts

Year	Anco	Trico	Tridon	Roberk	Fram	Pylon	Ideal	Nefco	Bosch	Total
1975	45.1%	31.6%	0.1%	11.0%	2.5%	5.8%	—	3.6%	0.6%	100.0%
1976	43.5	30.0	0.2	11.7	3.4	6.7	—	3.9	0.6	100.0
1977	39.5	31.0	0.3	12.6	3.8	7.8	—	4.2	0.7	100.0
1978	39.5	28.0	0.1	14.9	3.5	8.2	—	4.3	1.5	100.0
1979	35.4	25.9	0.2	17.9	3.8	10.3	1.2%	3.8	1.6	100.0
1980	34.3	24.8	2.0	18.8	3.2	10.9	1.7	3.0	1.2	100.0

(RX 5003-A, *in camera* 5 years)

* These calculations treat as a unit each refill and each blade. [27]

J. *Distribution of Replacement Windshield Wipers*

184. For many years, warehouse distributors ("WDs") in the auto parts aftermarket have bought wipers from manufacturers and distributed those parts to jobbers. (Sullivan 311; Peterson 942). Jobbers supply mechanics in gasoline service stations and garages who install the wipers. (Sullivan 311; Peterson 942; Shelton CX 3012Z–107).

185. Wiper manufacturers have traditionally sold directly to some oil companies which handle the distribution to their affiliated gas stations. (CX 1003Z–62; CX 801; CX 482Z–2). Although rubber companies once acted as wholesalers for gasoline stations, by 1970 they were no longer significant distributors of wipers. (CX 1003Z–64).

186. Sales by wiper manufacturers to WDs and oil companies are sometimes referred to as the "traditional" market. (RX 45A).

187. There are about 1,000 WDs and about 35,000 jobber outlets in the United States. (Abston 176).

188. A typical WD carries 40,000 to 65,000 auto part numbers. (Peterson 945; Abston 159–60, 240). Jobbers carry fewer part numbers and rely on the WDs to inventory and deliver slow moving part numbers. (Campbell 1121).

189. Some WDs now sell directly to installers such as muffler shops, car dealers and to retail stores, bypassing the jobber. (Abston 163, 175).

190. Many jobbers now buy wipers directly from the wiper manufacturer, rather than from WDs. (CX 1054H).

191. WDs generally carry either Trico or Anco wipers, or both, and stock from 100 to 250 part numbers of these lines. (CX 1542B; Abston 166; Campbell 1121). They also carry one or more "secondary lines" of wipers such as Roberk, Pylon, Nefco, Ideal or Tridon, which are "short" lines and less expensive than Anco or Trico. (Abston 166, 182–87).

192. Only Trico and Anco offer complete "customized" wiper lines, with sizes from 6" to 26" to fit old U.S. and foreign cars, trucks and buses, as well as snow blades, wiper arms, and windshield washing systems. (CX 1542B, G; CX 454Z–111 – Z–119). [28]

193. In the early 1970's, mass marketers[3] rapidly increased the retail sale of wipers to customers who install the product on the car themselves. (Abston 223–24).

194. A windshield wiper is one of the easiest products to install on an automobile. Little technical knowledge is required, and most peo-

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[3] The term "mass marketers" includes chains of department stores (Sears, Penneys, Wards) and discount department stores (K-Mart), and sometimes includes auto parts stores also known as "red fronts" (Trak Auto, Pep Boys, Penn-Jersey) and home and auto stores (Western Auto). (Oshei RX 4003Z–34 – Z–35; Abston 213; Sullivan 302; CX 1003Z–75).

ple are able to replace the wipers based solely on the instructions printed on a wiper package. (Campbell 1138; Peterson 985).

195. About 40,000 gasoline service stations closed between 1972 and 1977. Many of those that remain have cut their hours and sell only gasoline, not accessories. Many customers pump their own gasoline and do not have wipers installed at the gas station as frequently as before. (Frank 2592–93; Sullivan 429–30; RX 999A–B).

196. In May 1978, Trico's director of national account sales told Trico's chairman that "in the interest of increasing our share of the after-market and protecting ourselves against the trend of self-service marketing practices employed by some oil companies, we must strengthen our position in the mass merchandise market." Mr. Oshei, Trico's chairman, agreed with that assessment. (RX 1005B; Oshei RX 4003Z–126).

197. In 1977, Trico marketed a short line, universal blade to meet competitors such as Roberk, Pylon and Nefco. Trico's primary target was the mass merchant and the secondary target was the conventional warehouse where Trico's competitors, selling universal refills at low prices, had reduced purchases of Trico blades and refills. (RX 999A; Oshei RX 4003Z–116 - Z–119).

198. In 1980, Trico attributed part of the cause of a 14.6% drop in its sales to the decline in service stations from 226,000 in 1972 to 158,000 in 1980. More aggressive competition [29] from Anco, Tridon, Roberk and other wiper companies also was blamed, along with Anco's large sales force and general economic distress. (CX 1789).

199. In April 1977, Anco posted a price increase less than it wanted because Roberk, Fram, Pylon and Trico were selling universal refills at discounted prices through traditional, private label and volume retailer distribution and because the number of service stations—the backbone of its business for many years—was declining and the sale of wiper products was shifting to jobber-retailers and volume retailers. (RX 45).

200. Since about 1975, jobbers have reacted to the growth of retail parts sales and the decline of service station outlets by merchandising auto parts more effectively to the retail purchaser. (Abston 225–26; Cohn 2397; Campbell 1138–39).

201. Ten to 15 years ago, the average auto parts jobber would display oil cans and garage equipment in front of his counter and very little else. The jobbers filled orders for garages and service stations. (Frank 2597–99).

202. Jobbers have moved their service counters back in the store and placed more merchandise in front of the counter for the retail trade. There are displays which encourage the consumer to select his

own merchandise off of attractive racks. (Frank 2597; Abston 186; Peterson 950–51; Sullivan 334).

203. Most jobbers are in the retail business and are located in shopping centers. Many do not have delivery to the service station anymore. (Abston 202–03; Sullivan 332; Shelton CX 3012Z–106 - Z–107; Peterson 943; Campbell 1116).

204. WDs have assisted the jobber in making the transition from a wholesale to a retail operation by offering programs for merchandising and display, including advertising. In the past, for example, NAPA jobbers would not sell to consumers. Now, NAPA, an association of about 65 warehouses and their 5000 jobber customers, invites the public into its stores through a national advertising program. (Frank 2597–99; Sullvian RX 4005T–V; CX 1014J).

205. Parts, Inc., with 17 automotive warehouses and 31 jobber stores, has a program called Parts Plus which offers participating jobbers various marketing aids, including signs, fliers and private label merchandise. It is a program similar to NAPA and American Parts System. (Abson 162–63). [30]

206. Bumper-to-Bumper[4] is another marketing and warehouse system designed to assist WDs and their customers in appealing to the retail trade that was being served by K-Mart and Sears-type stores. (Campbell 135).

207. In early 1980, over 40% of jobber sales of wipers were to consumers, 25% were to service stations, 13% to garages, and 6% were to car dealers. (CX 1054F). Jobbers now make about half of their wiper sales to the consumer, with this retail trend still increasing. (Peterson 949–50; Campbell 1118, 1138–39).

208. Recently, it has become necessary for WDs and jobbers to stock wiper lines in addition to Anco or Trico to assist the jobber in merchandising wipers in the front of the store to the DIY trade. If the warehouse did not purchase the shorter lines, the jobber would purchase them from another warehouse. (Abston 182–84).

209. The majority of wipers sold at jobber stores are displayed in front of the store so that customers can make their own selection. (Peterson 951; Campbell 1140).

210. Anco sells a cabinet used to display wipers in the front of jobber stores. Both Anco and Trico products now are sometimes sold in front of the jobbing store with additional stock placed in back of the store. (Campbell 1140; Abston 186–87; Sullivan 334–36).

211. The distributor now wants a short wiper line to sell for DIY customers because it allows wider application with fewer part num-

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[4] Warehouses which offer retail programs to their jobbers such as NAPA, Bumper-to-Bumper, and Parts Plus are known as "program distributors." (Campbell 1137).

bers and gives the distributor a greater return on his investment. (Abston 185–86; Cohn 2436; CX 1543Q).

212. Roberk, Tridon, Pylon and Fram wiper products are also, on occasion, sold by jobbers to service stations and garages. The customer can choose whether to purchase a more expensive custom-fit Anco or Trico wiper or a less expensive universal, short-line product, whether the customer is a car owner or the installer. (Abston 185). **[31]**

213. Service station operators sometimes purchase wiper products from mass merchandisers to take advantage of low prices. (Frank 2590–92).

214. Montgomery Ward, Sears Roebuck, Penneys and other retailers now install wipers on automobiles in direct competition with repair shops, service stations and other installers. (Longman 724–25; Abston 280).

215. Tire company stores such as Firestone and Goodyear also install wipers. (Abston 281).

216. A car serviced in a repair bay at K-Mart would receive a Trico, Pylon or Roberk wiper. At Wards it would be a Pylon wiper. (Longman 707–08, 724–25; CX 1637H). A Sears customer in a service bay would receive a Tridon blade or refill since Sears is a Tridon account. (Sullivan 353).

217. A "mass merchant feeder" is a specialized WD who in addition to selling products to jobbers will also deliver prepriced goods to retail chains. (Williams 923–24; Frank 2617–20; Longman 498). Feeder warehouses generally carry about 15,000 part numbers, with about 50 part numbers of wiper products. (Abston 163–66).

218. Not all WDs fit in a neat category. A "feeder" WD may service mass merchandisers such as G.C. Murphy while also servicing jobbers. Steel City Products, for example, has between 1,000 and 1,500 customers, about 20% of which are categorized by Steel City as mass merchandisers while the remainder perform wholesale and retail jobbing functions. (Frank 2571, 2617–20).

219. Rye Auto, a "feeder" warehouse owned by Parts Industries, does about 60% of its business with auto parts stores and 40% with mass merchandisers. (Abston 220–21).

220. Jobbers, auto parts stores and mass marketers now sell a dual line of wipers to reach both the customer that is looking for a low-price line and the customer who is looking for a higher priced line. (RX 1052B; Sullivan 421; Abston 185; Longman 517).

221. K-Mart now sells both a lower priced line and a higher priced line of wipers to get not only the price conscious buyer but the buyer that would be more inclined to pay more for the quality of a well-known name. (Sullivan 347). **[32]**

222. In 1980, Trico was selling wipers directly to auto parts chains like Pep Boys and Western auto. (Sullivan 339–43).

223. Jobbers, auto parts stores and mass merchants are trying to sell wipers to the same DIY customers. (Lopez CX 3000Z–106; Abston 266; Campbell 113Z–39; Peterson 983–84; Frank 2599).

224. In analyzing possible entry into the wiper business, the Premier Rubber Company viewed all of the following outlets as part of a single aftermarket: department stores, discount stores, oil companies, retail parts stores, wholesale distributors and service station chains. (RX 323B–C).

225. Since windshield wipers are among the easiest products to replace on an automobile, there is no reason for a technically oriented person to seek wipers at a particular type of retail outlet, even if he might do so to obtain advice concerning more complex parts. (Peterson 985–86).

226. In 1979, more than 65% of blades and refills sold in the U.S. aftermarket were installed by the consumer; less than 25% were installed by professionals at service stations, about 5% at garages and 5% at new car dealers. (RX 190D; CX 1500A–B).

227. Some auto parts stores install wipers. (Cohn 2441–42).

228. In January 1977, Anco changed its marketing program to more vigorously seek mass merchandiser business. (CX 340B). The effort to sell to mass merchandisers required Anco to be aggressive in its consumer advertising and adopt new marketing strategies, particularly in regard to prices, discounts and removal of competitors' products. (RX 27A; RX 42).

229. In 1977, Trico's director of national account sales advised the chairman and president of the company that the conventional warehouses "having been influenced by our competitors offering a universal refill at low prices, have reduced their purchases of Trico blades and refills." (RX 999A).

230. WDs carrying Trico or Anco wipers now add a short, universal line such as Tridon in order to put their jobbers "in a position to compete with retailers of all kinds who have blades and refills." (Abston 254, 290–91).

231. The growth of wiper sales by mass merchants will continue and they will take a greater share of the wiper market. (Lopez CX 3000Z–74, 109–10; Williams 932–33; Bober 4280). **[33]**

232. By 1980, mass marketers accounted for about 45% of all refill sales. (RX 1035; Oshei RX 4003Z–111 – Z113).

233. Of Trico's total aftermarket sales, its sales to mass merchants increased from 5% in 1977; 10% in 1978; 12.5% in 1979; and 17.9% in 1980. (CX 1789U; RX 1071AAA; Oshei RX 4003Z–156 – Z–58, Z–37).

234. Both Trico and Anco as of the end of 1980 perceived that food,

hardware and drug store chains would become more important factors in the retail sale of wipers. Trico conducted successful experiments selling wiper products in supermarkets and by the end of 1980 had decided to pursue wiper business with grocery and hardware chains. Some of these retailers will buy wipers from WDs while others are large enough to buy directly from the manufacturers. (Sullivan RX 4005Z–146 - Z–48; RX 1059; RX 1062B; Oshei RX 4003Z–137–39; CX 1789M; RX 173G–H).

235. Pylon designed merchandiser units specifically for wiper display at food, drug and hardware stores. (CX 1656B; RX 810Q). Near the end of 1980, Winn-Dixie food stores considered expanding their automotive sections. (CX 1668A). Safeway was expanding its auto parts sections. (Nelson 5835–37).

236. Wipers are now sold in drug stores, food convenience stores, and supermarkets. (Cohn 2406–07).

237. In 1980, design changes in blades sold as OE, and the lack of ability of a refill with a steel flexor to fit a plastic blade had caused a change in the ratio of sales of blades to refills. In 1977, for example, Roberk's sales ratio was 4.5 refills to each blade. In 1980 it was 2 refills to 1 blade. (CX 1573B).

K. *Competitive Effect of New Entrants*

238. Until 1967 Anco and Trico were the sole domestic suppliers of wipers. (Nelson 6277–78). In the late 1960's, they had about equal sales in the wiper replacement market. Trico had most of the OE market, Anco had the rest. (CX 1003Z–41; CX 1014K).

239. Until recently, Anco and Trico were not very aggressive, and were unimaginative in their marketing. For example, Anco introduced refills in the late 1950's. Trico did not have a competitive refillable blade until 1963. (CX 1014D; Abston 246–47, 290; Longman 574, 704–05; CX 279J; CX 169C). Both were reluctant to push refills at the expense of the more profitable blades. (CX 1014J; CX 1587B). [34]

240. Tridon first decided to enter the windshield wiper market because Trico and Anco were the only competitors in the business at the time. (Shelton CX 3012Q).

241. Since blocking patents expired in the late 1960's there has been entry into the wiper manufacturing business by Tridon, Pylon, Roberk, Nefco, Fram, Bosch and Ideal, as well as increased activity from wipers imported from Italy and Japan. (Shelton CX 3012R; Glassman 4648; RX 5003A; CX 2509).

242. When Roberk introduced its first wiper to mass merchants, it had fast market penetration. (Lopez CX 3000Z–5).

243. Roberk's growth began to slow "as the competition began to come in, Pylon came in, as Anco and Trico who had up to this time

had not paid much attention to this end of the business got around to trying out various approaches . . . and we had Tridon who made an attempt." (Lopez CX 3000Z–60).

244. Gates, which entered the wiper market in the early 1970's with a product made for it by Tridon, encountered marketing problems in part because of competition from Fram, Pylon, Roberk, and others. (Williams 884).

245. The new entrants have had a direct and substantial effect on both Trico and Anco. (Frank 2602).

246. Trico began to feel increasing competition from other manufacturers selling to mass merchants such as Roberk and Pylon beginning in the middle 1970's. (Sullivan RX 4005Z–66 – Z–67). By 1980, Trico was having difficulty competing with price as well as application coverage in the mass merchant market with Pylon and Tridon. (CX 1789H).

247. In 1980 Trico switched from a direct sales force to selling through manufacturers representatives to sell to mass merchants and WDs. (Oshei RX 4003Z–127 – Z–128; RX 1005D).

248. Trico continues to make technical and design changes in its wipers. In part, this is in response to the activities of competitors. (Oshei CX 3013Z–69).

249. Since 1975, Trico has begun to manufacture plastic windshield wiper blades and has improved its metal windshield wiper blades to the point where they produce a superior wipe. It has also simplified the attachment of blades to arms. Trico has undertaken these new improvements to meet competition. (Oshei RX 4003Z–64 – Z–66). [35]

250. Trico began manufacturing plastic windshield wiper blades "to combat the introduction of plastic blades by others being offered at lower pricing than our metal superstructure blade. We were unable to reduce the cost of the metal blade, but we could produce plastic blades at somewhat lower figures, thus returning us to a reasonably competitive position where price was the predominant factor." (Oshei CX 3013Z–135). Trico introduced its plastic blade in direct response to the competition being offered by Tridon. (Oshei CX 3013Z–136).

251. In November 1980, Anco's Long Range Windshield Wiper Development Committee felt that the most pressing need was for a black, plastic short line windshield wiper blade. (RX 209).

252. In November 1980, Anco also felt that blade consolidation was top priority. (RX 210B).

253. As of December 31, 1980, Anco was attempting to develop a compact line. It was doing so because the market was asking for it and the competition had it. (Lindeen 2647).

254. Mr. Longman, the President of Pylon, testified at trial that "the windshield wiper business since I have been in it has been very

competitive. It has been tooth and claw." Mr. Longman also deemed Champion to be an aggressive competitor. (Longman 705).

255. Mr. Lopez, the head of Roberk's windshield wiper operations, testified that the sale of wipers to the automotive aftermarket "has been highly competitive for a long time." (Lopez CX 3000Z–41).

256. Thus, in November 1977, Roberk concluded that although unit sales of windshield wipers would increase, dollar sales would "remain relatively static." Roberk concluded that "this is due largely to the shift to retail from the traditional (and higher priced) distribution." (CX 1580D).

L. *Price Competition*

257. Anco and Trico wipers generally have had a reputation for being higher in quality than other wipers, and have higher prices and costs because of the better reputation and the fact that their production runs, for the larger number of types of wipers, tend to be shorter and more customized. (Longman 692–93; Sullivan 427; Oshei CX 3013Z–134; CX 1542G).

258. Anco and Trico have been able to increase their average replacement wiper prices from 1973 to 1978. Anco's [36] average price for blades was $1.12 in 1973 and $1.40 in 1978. Trico's was $1.14 in 1973 and $1.46 in 1978. Anco's average refill price was $1.51 a pair in 1973 and $1.61 in 1978. Trico's average was $1.11 in 1973 and $1.42 in 1978. These average prices, however, include more expensive heavy duty blades and refills and snow blades which are sold only by Anco and Trico. (CX 2511A; Winter 1787–89; Jacobs 3110–12).

259. Mr. Lopez testified that the price spread between Roberk's prices and the prices of Anco and Trico for competing wipers was less in 1980 than in earlier years. (Lopez CX 3000Z–42 - Z–43; Lopez CX 3000Z–100 - Z–101, Z–104).

260. Tridon felt that Trico would be "very aggressive in trying to win the K-Mart account" by cutting prices. (CX 2128; Shelton CX 3012Z–173 - Z–175).

261. Acushnet, a major supplier of the rubber used in the manufacture of windshield wiper refills, recently decided not to enter the windshield wiper business believing that it is too competitive, that there are too many competitors for the size of the market, that it is a slow growth business, and that it is price sensitive. (Harrington 1099–1100).

262. The Premier Rubber Company, another supplier of rubber used in the production of wiper refills, receives pressure from wiper manufacturers to hold the level of its prices for the rubber. (Singleton 3481).

263. Mr. Abston, the president of one of the largest WD and jobber

chains in the United States, testified that competition in the windshield wiper business became more intense during the early 1970's due to the new entry into the marketplace and that, while fifteen years ago there was an absence of active competition between Trico and Anco, competition among manufacturers of wiper blades and refills is now comparable with other products carried by his company. (Abston 286, 288; *see also* Frank 2601–02; Cohn 2417).

264. During the latter part of the 1970's windshield wipers were often used as loss leaders by mass merchants such as K-Mart, Penneys, Fay's Drug Store Chain, Two Guys, and Twin Fair. (Harrington 1100; Cohn 2408, 2414, 2418–19).

265. Prices of domestically manufactured blades generally are lower than those of most imports, other than the very cheap Brazilian or Taiwanese blades. Japanese blades are more expensive than U.S. blades. (Cohn 2402). **[37]**

266. Since the acquisition in 1978, Anco has become a more aggressive competitor offering improved dating terms, free merchandise and more promotion on wiper products to WDs, jobbers, jobber retailers, mass marketers, feeders, oil companies and tire companies. (Lindeen 2632–36; Peterson 976–77; Campbell 1146; Glassman 4791–92).

267. Trico has given price concessions to its large national accounts because Trico might lose the business to one of its competitors, such as Pylon, Tridon, or Anco. (Sullivan 412–14).

268. Trico's costs have been increasing in recent years. In 1979, when Trico attempted to pass these costs on to its customers, it was "rudely told that the higher prices would not be accepted" by accounts such as Atlas and NAPA. (Oshei RX 4003Z–93 - Z–96; RX 1067Q).

269. Trico did not raise prices on the refills it sold to Sears and Ameron when it raised prices to the rest of the aftermarket in 1977 because Roberk and Pylon were selling lower priced windshield wiper refills, and Sears and Ameron wished to be more price competitive with those refills. (Sullivan RX 4005Z–65 - Z–66).

270. After Tridon bid to take the Sears' wiper business away from Trico in 1980, Trico responded to retain that business. Tridon then returned to Sears with a still lower price and won the Sears business. (CX 2127; Shelton CX 3012Z–168 - Z–171; Sullivan 428).

271. In 1973 Pylon had an average net unit price for a blade or two refills for $1.03. In 1978 that price was 91¢. (CX 2511A).

272. In 1974 Roberk had an average net unit price for a blade or two refills for 92¢. In 1978 that price was 84¢. (CX 2511A).

273. At first, Roberk's wipers were sold at retail for $2.65, down to $1.39 on promotion. Anco and Trico wipers were sold at a fair trade retail price printed on the box of $4.95. (Lopez CX 3000Z–59).

274. In 1977 Anco brand refills had a suggested retail price from

$3.30 to $4.90 a pair, depending on the size and type. Roberk, Nefco, Fram, Pylon and Anco Rainy Day refills were selling at retail prices from $1.99 to $2.49. (CX 347C).

275. In 1977 different mass merchants sold the same brand of refills at varying prices. (CX 347C). [38]

276. In 1980, Nefco showed traditional market customers that its blades and refills cost less, offered the jobber and WD more profit, and retailed at less than those sold by Anco and Trico. (CX 880A–F).

277. A Fram study of competitive pricing of blades and refills in May 1979 showed Fram's price to WDs at $1.10, Anco - $1.50, Trico - $1.69, Ideal - $1.20, and Pylon and Roberk both ranging from 84¢ to 96¢. (CX 1445G). Terms of sale also varied. (CX 1446C).

278. A 1980 market study by Bosch noted that list prices for 12 blades sold by four companies showed that each company sold each blade at a different price, and that the mark up for jobbers varied for each company for each blade. (CX 1500Q).

279. In 1977, an Ideal market study showed prices for a pair of 16" refills sold to the traditional aftermarket:

	WD	Jobber	Dealer	List
Anco	$1.78	$2.28	$3.24	$4.90
Trico	1.66	2.13	–	4.90
Nefco	1.35	1.88	2.90	4.80
Fram	1.07	1.57	2.36	3.93

The report also noted that Nefco "will throw in an additional 5%"; that both Anco and Trico discount in competitive situations and had prices in different cities varying by 10%; and that jobbers offer refills at discount prices from time to time to increase store traffic. (CX 1542F).

280. From 1973 to 1978, Anco sold a "Rainy Day" line of wipers, directed at mass merchants. (Schwalbe 4384; Lopez CX 3000Z–46 - Z–47; CX 1014P–Q). Anco charged a lower price for this brand than it charged for Anco brand wipers. (CX 935G; CX 438; CX 1634F). The Rainy Day line of wipers was different in quality from the Anco brand. (CX 1544B; CX 1542E).

281. Anco decreased its prices on Rainy Day wipers from 1974 through 1978. (CX 340A–B, G, K; CX 445J; CX 1090A; CX 1093A; CX 1105). Anco dropped its Rainy Day refills from $1.35 per pair to $1.05 in 1974. (CX 1014Z–21; CX 1105; CX 1111A). In 1976, Anco decreased the size of order required to obtain the lowest Rainy Day price. (CX 1093A; CX 1096A). On June 1, 1977, [39] Rainy Day refill prices were dropped to $.99 per pair. (CX 340K; CX 1090A; CX 1093A). Then the price was dropped to 86¢. Pylon met the prices on an account basis.

Roberk dropped prices to all customers, below the Rainy Day price. (Longman 542–43; CX 1634F).

282. Shortly after it acquired Anco in 1978, Champion withdrew the Rainy Day product line and started to sell the higher priced Anco brand wiper to the mass merchant channel. (CX 438; CX 467C; CX 477C; CX 1634–I).

283. In April 1977, Anco deferred a proposed price increase on refills because of Nefco's low prices, as well as competition from Roberk, Fram, Pylon and Trico. (RX 45).

284. Before the acquisition, Mr. Brotje, Champion's executive vice president and chief financial officer, felt that the wiper market "resists price increases." (CX 2070A).

285. In late 1980, Bosch planned to cut prices on its U.S. windshield wiper product line in order to better compete in the United States aftermarket. (CX 1500P).

286. Fram increased its windshield wiper blade prices in 1976 because it was faced with higher costs. (RX 239). Until that increase, Fram "bought their share of the market with promotional pricing." (CX 1542F).

287. In January 1978, Fram reduced the prices of its blades and refills. (RX 243–44).

288. Pylon did not have a price increase on its wiper blades or refills from 1972 until the fall of 1979. (RX 822A).

289. Because its customers keep asking for lower prices Pylon keeps its profits up by reducing costs of its windshield wiper blades by obtaining less expensive materials and reducing the cost of packaging. (CX 1634W).

290. In 1980, Pylon hoped to be able to raise wiper prices 5% "but due to the competitive nature of our business we are unable to." (CX 1638D).

291. Competition has caused Roberk to hold the price for many years on wipers without change, reducing costs to maintain margins. (Lopez, CX 3000Z–22 - Z–25).

292. Both Mr. Oshei, the chairman and president of Trico, and Mr. Sullivan, Trico's manager of aftermarket sales, testified that competition in aftermarket sales of wipers had **[40]** increased since 1978 because of the acquisition of Anco by Champion. (Oshei RX 4003Z–40 - Z–41; Sullivan 436–37).

293. In 1980, Trico blamed its declining sales of wiper products on four factors: the general economic decline, a reduction in the number of service stations from 226,000 in 1972 to 158,000 in 1980; "more aggressive competition by Anco, Tridon, Roberk and others"; and what was perceived to be an inadequate number of Trico salesmen compared to Anco/Champion salesmen. (CX 1789C).

294. Trico's 1981 Marketing Plan noted the vigorous competition for mass merchant wiper business being offered by companies such as Pylon and Tridon:

> Presently, we have difficulty competing with price as well as application coverage with Pylon and Tridon who offer full coverage (short-long frame) refills at prices starting at $1.04 and as low as $.91 per pair.

(CX 1789H).

295. In 1980 lower prices to mass merchants by Pylon and Tridon prevented Trico from raising prices on wipers in the aftermarket. (Oshei RX 4003Z–147).

296. In late 1979, or early in 1980, Trico initiated a program aimed at increasing its penetration of the wiper product aftermarket. As part of that effort, Trico decided to replace its sales force with manufacturers representatives. (RX 1067D; Oshei RX 4003Z–83).

297. Trico's program to increase its replacement sales of wipers was directed especially to mass marketing accounts. (Oshei RX 4003Z–84; 4003Z–87–89).

298. In 1980, Trico reduced from 1,500 units to 400 units the amount of purchases required to obtain prepaid shipment because certain "mass marketers who sell low price competitive blades such as Tridon, Roberk, Pylon [were] beginning to show an interest in buying a higher quality national brand line such as Trico." (RX 1052A–B; Oshei RX 4003Z–129 – Z–131).

299. When Trico raised its prices on a variety of items in February, 1977, it specifically excluded passenger car blades and refills, because those products were being sold in a "highly competitive" market. (RX 987; Sullivan RX 4005Z–102 – Z–103). [41]

300. Trico raised its prices for passenger car blades, refills and arms in December 1977, two years after the previous general price increase. (RX 991).

301. As of the end of 1980, Trico was unable to raise its prices to keep up with its cost increases. (RX 1061; Sullivan RX 4005Z–150).

302. Trico explained in its 1980 Annual Report, "selling price increases, due to depressed market conditions and the effects of increased competition, have not kept up with inflation. Management expects this trend to continue until market conditions improve." (RX 1067P; Oshei RX 4003Z–90 – Z–93).

303. In soliciting Walmart's business in 1980, Tridon offered Walmart a 2% "performance rebate," which is not offered by Tridon to other customers. (CX 2118A; Shelton CX 3012Z–153 – Z–154).

304. Walmart received from Tridon a special 2% advertising allow-

ance in 1980 on its purchases of Tridon products. (CX 2121; Shelton CX 3012Z–159 - Z–160).

305. Tridon in 1980 granted a special 5% warehouse allowance to TG&Y in 1980. Such an allowance is normally not granted by Tridon. (CX 2116A; Shelton CX 3012Z–150 - Z–151).

306. Tridon made another exception to its standard practices when in 1980 it agreed to ship wipers to TG&Y with prepaid freight on shipments of just $250 or more, rather than the standard $500 minimum. (CX 2116B; Shelton CX 3012Z–151).

307. TG&Y received favorable credit terms of 2%/60 days, terms not normally offered by Tridon. (CX 2116B; Shelton CX 3012Z–152).

308. Tridon did not have any price increase in calendar year 1980 on its aftermarket wiper products, even though its costs for those products increased approximately 10% that year. (Shelton CX 3012Z–71 - Z–72).

309. Tridon initiated a cost reduction program in 1980 which resulted in savings of $203,950. Tridon had a 1981 savings target of $500,000. (CX 1887H).

310. In late 1980, an internal Tridon memorandum noted that "buyers were more conscious of price than quality." (CX 1887C). [42]

M. *Profits*

311. Windshield wiper marnufacturers[5] profits on sales to aftermarket from 1976–80 as follows:

	1976	1977	1978	1979	1980
Anco	9.4%	11.5%	11.2%	10.3%	5.0%
Trico	11.2%	10.1%	9.5%	3.7%	(1.6%)
Tridon[6]	(28.9%)	(28.3%)	(7.6%)	(6.6%)	3.7%
Pylon	12.0%	6.7%	7.8%	9.1%	8.4%
Fram	(43.3%)	(14.8%)	(15.8%)	(6.2%)	(4.7%)
Roberk	11.6%	7.8%	7.9%	7.8%	10.6%
Nefco	(0.5%)	(2.7%)	3.0%	(1.4%)	(20.2%)

(RX 9510A).[7] [43]

N. *Ease of Entry*

1. Capital Costs

312. Mr. Longman and his associates purchased Pylon from the STP

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[5] There is no profitability data in the record for Bosch prior to 1978. Bosch's after-tax profit as a percentage of total net sales of windshield wiper replacement products in the United States was 3.7% in 1979 and 4.6% in 1980. (RX 276F; CX 1490A; RX 274F–G; RX 294B).

There is no meaningful profit trend data in the record for Ideal since that company entered the relevant market in 1979. (CX 1554A).

[6] Tridon's sales of wipers in 1976 were less than $40,000. (RX 5022).

[7] This profit data was after taxes. Complaint counsel's proposed findings on profits before taxes, although limited to five of the companies, show generally the same trend. (CX 8011 revised II).

Corporation in 1974 for $550,000, assisted by a loan from the Small Business Administration. (Longman 690).

313. In 1969 Pylon's tools, dies and molds cost Pylon $281,071; machinery and equipment cost $181,028; and furniture and fixtures cost $110,821—or a total of $572,920 in manufacturing assets. (CX 1643).

314. Book value as of September 19, 1980 for the equipment used to manufacture Tridon wiper products was $1,619,000. Of that amount, $1,276,000 was allocated to plastic molding and rubber extrusion equipment, processes which some other wiper manufacturers obtain from outside vendors or do not employ at all. (CX 2046B).

315. Fram's total investment in windshield wiper equipment and tooling in 1980, exclusive of equipment used in Canada, was approximately $415,000. (CX 1477).

316. Roberk was able to enter the windshield wiper business by using manufacturing space and equipment it already had for the manufacture of mirrors or other Roberk products. (Lopez CX 3000Y–Z). The capital cost to Roberk in 1970 to manufacture its first refill was about $100,000. (Lopez CX 3000P).

317. By 1980, the Ideal Corporation had begun manufacturing refills rather than relying exclusively on Roberk's facilities. Ideal invested a total of $142,000 to acquire its own slitters, tooling, molds to be used by outside rubber vendors, pack tables, assembly and cutting machines and clip dies. Ideal shared stamping presses. (CX 1572D; RX 686H).

318. Total cost for capital equipment used by Roberk to manufacture wipers from 1971 through 1980, was $638,773. (CX 1581I). Of that sum, $170,211 was spent in 1979 for a Monsanto rubber extruder and a salt bath which accompanied the extruder. (CX 1581F).

319. The total cost of all fixed assets sold by Nefco Division of the Neff-Perkins Company in 1979 was $297,328.15. That included $178,995.32 for molds, dies and tooling; $46,960.38 for machinery and equipment and $64,358.28 for factory fixtures. (CX 1708A).

320. There are no significant "sunk" costs (costs to exit industry) associated with manufacturing windshield wipers. (Glassman 7277). The sales force, whether a factory force or manufacturers representatives, is not a sunk cost. The presses, packaging equipment, injection molding machines and other equipment are standard. The buildings used to make windshield wipers can be used for other purposes. (Glassman 7276–79). [44]

321. There is no capital cost barrier to entry into the windshield wiper aftermarket. (Glassman 4664–66; Nelson 5395).

2. Patents

322. Patents do not constitute a barrier to entry into the wiper aftermarket. (Oshei RX 4003Z–51 - Z–52; Harbison 3622; Longman 688; Lopez CX 3000Z - Z–3; Neff 855).

3. Suppliers

323. Companies successfully compete in the manufacture and sale of wipers with different levels of manufacturing integration. Tridon, for example, performs all of its own rubber extrusion for the manufacture of wiper elements. Trico extrudes part of its needs for wiper elements itself, and purchases elements from a supplier. Roberk also has recently undertaken to extrude some of the wiper elements it requires while continuing to purchase the remainder of its needs from suppliers. (Singleton 3462–63). No other wiper manufacturers, including Anco, extrude rubber elements. (Nelson 5996).

324. Trico employs 40 to 45 persons in its tool design department and 120 to 130 toolmakers. (Stroh 41; Stroh 40). Trico resorts to outside vendors to manufacture some tooling. (Stroh 118).[8]

325. Anco buys most of its wiper product tooling from outside vendors. (Harbison 3540–41). Anco has five tool designers on its staff and 24 tool and die makers. (McKissack CX 4504E–I).

326. With its present staff, it is not practical for Anco to design or manufacture its own rubber molds. (McKissack CX 4504Z–10).

327. Anco also cannot manufacture progressive dies because it does not have the necessary equipment. (McKissack CX 4504Z–11). [45]

328. Pylon receives all molded or stamped parts from outside vendors. Those parts are then assembled and packaged at the Pylon plant. Pylon does its own slitting and designing. (Longman 229, 489, 532–34, 669–71).

329. In 1979, Trico was molding some of its plastic parts in-house and was relying upon outside vendors for the rest of its supplies. (Oshei CX 3013Z–63 - Z–64).

330. There are many first class tool manufacturing and tool design shops available to Anco in the Chicago area. (McKissack CX 4504Z–21 - Z–22). Anco uses several different vendors for manufacture of its tooling, all in the Chicago-Indiana area. (McKissack CX 4504Z–14 - Z–15).

331. There are custom molders that can produce the natural rubber used for wiper refills even without prior experience. (Lopez CX 3000Z–87 - Z–88).

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[8] A "tool" is a device used to produce a part. It can be a stamping die to produce a metal part or a mold to produce a part in plastic or rubber. "Tooling" refers to the process of manufacturing the machine tool to produce the part. (McKissack CX 4504Y; Harbison 3540).

332. When Anco began selling plastic wiper blades it relied upon a vendor to manufacture those parts. (McKissack CX 4504Z–78 - Z–80).

333. When the Premier Rubber Company investigated the possibility of assembling refills in 1977, component parts were available from outside vendors at a competitive price. (Singleton 3475).

4. Equipment

334. Manufacture of a windshield wiper blade involves stamping operations, wire forming for springs, and rubber molding for manufacture of the blade element. (Stroh 49–50). Production of the flexor or vertebra of a windshield wiper blade and for the blade superstructure involves stamping operations, use of punch presses, metal roll forming equipment and some screw machine equipment. (Stroh 79; Harbison 3538–39).

335. Manufacture of a wiper arm entails use of a screw machine process, grinding and heat treating to make a pin. A wire drawing operation is used to shape coiled steel into the arm shape. A stamping operation then puts the arm into final shape except for plating and painting. (Stroh 47–49).

336. The equipment used to manufacture wipers is generally commercially available. (Harbison 3539; Glassman 4650; Oshei RX 4003Z–47 - Z–48; CX 3013Z–62). [46]

337. Raw materials necessary to manufacture wipers are generally available on the open market through domestic sources. (RX 1020B).

338. Windshield wiper superstructures are produced by ordinary stamping and are not difficult to design and manufacture. (Neff 844, 855).

339. Wipers are low technology goods that involve manufacturing processes which are well-known and do not require highly specialized equipment. (Danielson 3810; George 788–89).

340. The edge of the windshield wiper elements must be clean and straight with no imperfections to achieve a consistent wipe. (Stroh 69).

341. The term "slitting" means separating a sheet of wiper elements which has been received from the rubber supplier molded into a single rubber sheet. The slitting operation separates the elements into individual squeegees. (Harbison 3542).

342. The term "trimming" means performing the final trim operation on the wiper element after it has been assembled into the refill flexor or, in the case of a blade, into the blade superstructure. (Harbison 3542). The terms "trimming" and "slitting" are often used interchangeably. (Longman 532–33).

343. The equipment necessary to perform the trimming operation, which gives the element a clean, straight edge, is commercially available. (Oshei CX 3013Z–61; Stroh 103).

344. Pylon used a commercially available slitter-trimmer when it first offered a wiper refill. (Longman 533). When Roberk entered the wiper business, it procured elements which had a molded edge and did not have to be slitted or trimmed. (Longman 534).

345. When Roberk bought two slitters in 1977, they cost about $10,000 each. (CX 1581A, G).

346. Although commercial slitting equipment is available, wiper manufacturers have applied their own improvements to the equipment, for example, to cut longer wiper elements. (Stroh 69–70; Harbison 2542–43).

347. Trico initially used off-the-shelf slitting equipment. (Oshei CX 3013Z–58 - Z–61).

348. General Motors used a piece of cutting equipment that already was in the Delco Products Division plant and modified it to make it a windshield wiper element slitter. (George 766). [47]

349. In the late 1970's, Neiman, the largest manufacturer of wiper products in France, was using a production line of 20 women who slit the rubber elements by hand, using ordinary safety razor blades. (Neff 843–44, 856; CX 42B).

5. Compounding Rubber

350. A good rubber compound is critical to the performance of a wiper. (Singleton 3506). Friction levels, ozone resistance and the basic flexibility of the element all depend on rubber compounding. (Stroh 60–64).

351. "Compounding" means deriving a group of ingredients in a wiper element. Different ingredients go into a dry mixture, which is then vulcanized just as a cake is baked. (Harbison 3558).

352. "Molding" occurs when the rubber compound is put into a mold and pressure and heat are applied. (Harbison 3559).

353. In 1978, all wiper manufacturers were supplied their rubber already mixed by rubber companies or custom rubber molders. Anco has three suppliers who compound and/or mold the rubber elements. (Harbison 3559–60).

354. The Premier Rubber Company formulates and mixes the rubber used in the manufacture of windshield wiper elements. Premier has supplied Anco since 1928 and has sold to Ideal and Roberk. It also molds elements for those companies. (Singleton 3462–63).

355. The Neff-Perkins Company developed the compound but continued to purchase the rubber which it molded into wiper elements. (Neff 838–40). Neff-Perkins continued to supply wiper elements to Nefco after the wiper division was sold to Neiman Industries, Inc. (Neff 836–37).

356. Tridon developed its rubber compound with its rubber supplier

in Akron. Tridon buys the rubber and extrudes it into squeegees. (Shelton CX 3012Z-96; CX 1396B).

357. Pylon receives its rubber elements, already molded, from the Delta Rubber Company and the Roller Rubber Company. (Longman 532).

358. A company with basic manufacturing knowledge of rubber compounds and tolerance molding could create a wiper refill that would be effective in the marketplace. (Neff 856). [48]

359. The Acushnet Rubber Company supplies compression molded wiper elements to both Trico and Fram. (Harrington 1095).

360. Fram evaluated Premier rubber compounds in 1979 and found one to be at least as good as the Acushnet compound Fram was buying. (CX 1448A).

361. Anco does not know the formulas for rubber compounding used in the elements it puts in refills and blades. Anco gives its suppliers specifications that the rubber product must meet. Those specifications were developed by the OEM, not by Anco, and are available to all wiper manufacturers. (Harbison 3560-61; Regan CX 3008Z-182).

362. Acushnet is willing to supply new wiper manufacturers with rubber and would assist in development of a suitable element. (Harrington 1095, 1106).

363. Acushnet, which has been producing rubber for Trico for nearly 40 years, absorbs the cost of developing rubber compounds for Trico. (Oshei CX 3013Z-44, Z-46). Acushnet, not Trico, owns the formula for rubber elements supplied to Trico. (Stroh 99, 100).

364. Trico has been extruding its own rubber elements for part of its needs since 1976. The rubber used in the extrusion process is a blend of synthetic and natural rubber developed by Trico chemists. (Oshei CX 3013Z-51).

365. Rubber companies were willing to share with Trico their information for developing an extrusion process because they also supply extrusion equipment, which they hoped to sell to Trico. (Stroh 74).

366. Trico was able to develop a satisfactory formula at a cost which made in-house extrusion of wiper elements more economical than the purchase of compression-molded elements from Acushnet. (Stroh 71).

367. Trico, Tridon and Roberk extrude their own wiper elements. (Nelson 5996).

368. The Delco Products Division of General Motors developed a satisfactory rubber compound. (George 761-63).

369. Pylon improved its wiper elements by employing a retired rubber chemist on a part-time basis. (Longman 524-25). [49]

370. To improve the formula of its wiper elements cost Pylon $200,000 over the span of three years. (Longman 526, 725).

371. In the early 1970's, Acushnet mis-mixed the rubber compound

for Fram's initial production run of wiper blades and refills. Once the problem was discovered, it was corrected and Acushnet absorbed the cost of the bad batch, which was about $100,000. Fram has been satisfied with its element quality supplied by Acushnet ever since. (Slight 6576–78; Harrington 1076).

6. Distribution

a. *Factory Sales Force*

372. Trico dropped its direct sales force in order to reduce sales costs and to increase the number of its salesmen and the penetration by Trico to all customers in the replacement market, with particular emphasis on mass marketing accounts. (Oshei RX 4003Z–83 - Z–84, Z–89; Sullivan RX 4005L).

373. In 1978, Trico dismissed the 12 factory salesmen it had used to service one of the largest traditional aftermarket accounts, NAPA. NAPA then used its own agents to service its warehouses. (Sullivan 357; Sullivan RX 4005Z–170).

374. WDs sometimes help promote wipers by having their own representative visit the jobber. (CX 1543S).

375. There is no need for a wiper manufacturer to have a direct sales force to sell wiper products to oil companies. Oil companies distributing wipers through gas stations have their own sales organizations. (Sullivan 351, 414–15; RX 4005S).

376. Pylon employs 17 manufacturers representatives who employ 80 to 100 salesmen. (Longman 617).

377. Tridon has 13 to 15 manufacturers representatives under contract, each of whom employs up to 10 salesmen. (Shelton CX 3012Z–38).

378. Roberk employs 15 manufacturers agencies to sell wiper products who, in turn employ about 90 salesmen. (CX 1553E).

379. Before the company was sold to Neiman, Nefco employed 28 manufacturers representatives to sell wiper products in addition to four factory-employed sales managers. (CX 1680G–H; RX 877G). [50]

380. Ideal sells its wiper refills through manufacturers representatives. (CX 1532B; RX 688G).

381. Robert Bosch employs a direct factory sales force of about 75 persons. (Heinemann CX 3003Z–35).

382. Fram uses a direct factory sales force. (F. 141).

383. As of the end of 1980, Champion's sales force for spark plugs and windshield wipers numbered about 400. (Lindeen 2689).

384. Neither the president of Tridon, Inc. nor any of the company's regional sales managers had prior experience selling wipers before joining Tridon. (Shelton CX 3012Z–42 - Z–45). Roberk has had no

difficulty recruiting competent manufacturers representatives to sell wipers. (Lopez CX 3000N–O).

b. *Pull-Through Marketing*

385. Champion uses pull-through marketing, which consists of trade and consumer advertising and promotion, to pull merchandise through marketing channels to the user, and calls by a direct sales force on jobbers and retailers as well as distributors. (Stranahan CX 3007Z–50 - Z–51).

386. Prior to its acquisition by Champion, Anco did engage in pull-through marketing with trade advertising (CX 279G), cooperative advertising and promotional expenditures (CX 294G), providing cabinets (CX 291P, Y), publishing catalogs (CX 318H) and supplying sales aids (CX 318F), and by its direct sales force spending most of their time calling on jobbers and dealers. (CX 23A; CX 1003K).

387. Oil companies do not generally require that their wiper suppliers offer premiums or other sales incentives. The oil companies conduct their own promotional programs. (Sullivan 351; Stranahan CX 3007Z–51 - Z–52).

388. Western Auto and Pep Boys types of retail accounts do not want premium promotions. (Sullivan 342).

389. Trico and Anco have regular spring and fall promotion programs in which premiums or special sales terms are offered. (Sullivan 325–28; Peterson 976–77). Roberk, Nefco and Pylon also expend promotional funds for wiper products. (CX 1553B; Neff 850; CX 1619D–F).

390. Pylon makes advertising money available to all of its customers. (Longman 636). Roberk employs cooperative advertising as a promotional device. (Lopex CX 3000Z–31). [51] Ideal does, too. (CX 1554B). Ideal provides advertising slicks for its customers to promote its wiper line. (RX 689Z).

391. Beginning in 1980, Tridon embarked on extensive advertising of its wiper products to the automotive trade. It was actively considering an increase in trade promotions at the end of 1980. (RX 1140I; RX 1139A to E; Shelton CX 3012Z–142).

392. Trico never spent more than $15,000 annually in advertising wiper products through 1978 and still does very little trade advertising. (Sullivan 337; CX 1712B; RX 954EE). Trico did not offer a cooperative advertising program until January, 1980. (RX 1040). Trico did not rely on pull-through marketing before the acquisition but relied instead on its OEM reputation to provide demand. (CX 1003K).

393. Prior to its acquisition by Champion, Anco's radio and television advertising expenditures peaked in 1976 at $589,395. (CX 1222B; CX 266).

394. Champion acquired Anco because it believed it was possible to

expand sales in the windshield wiper market. (Brotje CX 3011Z-104 - Z-105). After the acquisition Champion started a national television advertising campaign for Anco brand wipers. (Longman 545).

395. Through its advertising campaign, Champion believed it could demonstrate that, from a safety point of view, windshield wipers should be replaced once a year. Champion believed that the windshield wiper market was undersold. It had data indicating that wipers were changed only once every three years. (Brotje CX 3011Z-97 - Z-98).

396. The way Champion intended to develop Anco was by expanding the size of the market to convince people to change their wiper blades more often. (Stranahan CX 3007Z-122 - Z-123).

c. *Consumer Recognition of Brands*

397. Most wiper products consumers do not know the difference between wiper products or care about the brand they buy. (Cohn 2433; Oshei RX 4003Z-153; Hoyt CX 3009Z-133; RX 190C).

398. Nearly half of the total aftermarket sales of Trico are under private label, not under the name Trico. (CX 1789D; Oshei CX 3013Z-31). [52]

399. In 1975, NAPA warehouses asked that its Trico wipers be supplied under a NAPA label and that was done. (Oshei CX 3013Z-15 - Z-16).

d. *Quality*

400. It is the reputation of a company for manufacturing quality products that is important to WDs and their customers in selecting a wiper or other auto part, not brand name. Champion and Anco both have a reputation for high quality. (Campbell 1122-232).

401. The surest way of attaining a reputation for quality is to be a supplier of wiper products to automakers for OE installation. (CX 1496A; Shelton CX 3012Z-139 - Z-140; Frank 2580; Sullivan 329; CX 1003K).

402. Tridon used the fact that its products are used as OE on Fords and Volkswagens and approved by other OEMs to become an effective competitor in the windshield wiper market. (Winter 2116-17).

403. There are no distributional barriers to selling wipers for OE installation or OES. (Winter 1360).

404. Being an OE supplier is not as important in the sale of accessories like windshield wipers as it is for products that go under the hood like spark plugs. (Abston 277). A windshield wiper product manufacturer may demonstrate quality by having sold to other WDs. (Abston 172; CX 1646C).

7. Short Lines

405. Although WDs and jobbers usually carry broad, customized lines of wipers manufactured by Anco or Trico, new entrants have entered the market with short universal wiper lines. (Frank 2582; CX 1543Q, U).

406. Auto parts distributors are interested in reducing inventory due to high finance costs and a product with few part numbers would be more attractive than one with many part numbers. (Campbell 1141; Cohn 2436; Frank 2581; Abston 234; Lindeen 2649).

407. Nefco, which sold primarily to WDs and jobbers, did not have a line as broad as Anco's or Trico's but once blades were added to the line of refills the line was satisfactory in terms of length. (Neff 849). [53]

408. Both Fram and Gates had initial success selling to WDs despite the fact that they sold short lines. (Slight 6575–76; Williams 877–78).

409. Pylon with a short line of wiper attacks Anco wipers as having "very limited blade coverage for imports" and no refills to fit Tridon blades sold as OE on Fords. (CX 1650B) Pylon claims to offer "the greatest coverage in the industry." (CX 1646E).

410. Nefco advertised to WDs that seven lengths of refills and blades would fill "over 96 percent" of wiper applications. (RX 886E, U–X, Z–2 - Z–12).

411. Bosch advertises "universal wiper blades" with applications for 38 auto makes "with a minimum number of blades." (CX 1487C).

412. Fram claims that its six wiper blades and five refills will fit 99% of all domestic applications and 95% of those for foreign cars. (RX 227A).

413. The standard refill sizes are 13", 15", 16", 18", and 19." The 16" size alone covers 50% of volume and sizes 15", 16" and 18" are 90% of volume. (CX 1542G).

414. Since the acquisition, Champion has used a short line of Anco wipers, of from 6 to 10 part numbers, to enter foreign markets. (CX 677B; CX 582D, CX 545C; CX 592V).

8. Economies of Scale

415. Anco has research and development costs for its OE business, while its competitors who do not pursue that business avoid those costs. (Schwalbe 4380).

416. Trico has semi-automated blade manufacturing equipment, but that equipment is not used for low-volume blades because it is not economical. Low volume blades are assembled by hand. (Stroh 89–90).

417. Companies like Roberk which offer a short line of wipers sell

their products at prices considerably lower than Trico and Anco. (Oshei CX 3013Z–134).

418. Roberk realized economies of scale and reduced its wiper product prices in the initial years of its entry. (Lopez CX 3000Z–22). Pylon advertises that it enjoys production economies that allow it to produce a quality product at a low price due to its short line. (CX 1646H; CX 1651K; CX 1650C). [54]

419. It is cheaper to produce a great many of the same kind of wiper part than it is to make many different wiper parts. (Stroh 114).

420. The higher the volume per part, the lower the unit cost due to overhead absorption and the efficiency of longer runs. (Shelton CX 3012Z–202).

421. A manufacturing plant producing wiper blades and refills for the aftermarket has most of the economies of scale with a market share in units of less than 10%. An assembling facility would be efficient with less share of the market. (Glassman 7302–03; Nelson 5999–6001).

O. *Potential Expanders*

1. Tridon

422. Tridon is financially viable and strong. (Shelton CX 3012Z–53).

423. Tridon has expanded its clamp manufacturing facilities in Smyrna, Tennessee and could expand its Smyrna plant to permit manufacture of wiper products. (Shelton CX 3012Z–101).

424. In the late 1970's, Tridon determined to gain the acceptance of U.S. OEM for its wiper products. One of its first steps to that end was construction of a new wiper plant in Oakville, Ontario. The plant opened in October, 1980. (Shelton CX 3012W–Y).

425. One of the reasons for building the Oakville plant in 1980 was "to put together a technologically sophisticated wiper manufacturing plant that gave Tridon a cost advantage, thereby giving it a pricing advantage in the market." (Shelton CX 3012X).

426. Construction of the Oakville plant doubled the space Tridon devotes to the manufacture of windshield wipers and increased capacity by at least 50%. (Shelton CX 3012Z–102 - Z–103). The plant is 80,000 square feet, all but 400 square feet of which is devoted to wiper manufacturing. (Shelton CX 3012Z–96 - Z–97).

427. Tridon's Ontario plant is highly integrated, including a steel silo for the storage of plastic pellets used by the extruding and injection molding machines. (CX 2043I). Tridon purchases its rubber from an outside source and extrudes its own squeegees. (Shelton CX 3012Z–96). [55]

428. The Oakville plant also contains an extensive quality assur-

ance and development laboratory, a large warehouse, a number of injection molding machines to produce wiper blade superstructures and clips, extruder machines to produce the squeegees, and a product assembly and packaging area. The plant also contains its own air conditioned tool room. (CX 2043H-I).

429. Tridon's engineering force at Oakville consists of five engineers and three or four technicians. (Shelton CX 3012Z-105).

430. As of the end of 1980, the Oakville plant was not operating at full capacity. (Shelton CX 3012Z-202).

431. Tridon's initial wiper product sales to OEM in the United States occurred in 1977. The amount of such sales increased substantially in 1978. (CX 1873B).

432. Tridon's initial breakthrough in sales to OEMs was with Ford. Ford worked closely with Tridon's engineering department to develop wiper blade concepts for OE use. (Shelton CX 3012Z-99).

433. At the end of 1980, Tridon wipers were being installed by Ford as OE on 16 different Ford models. Tridon was used exclusively as the windshield wiper product for OE made by Volkswagen of America. Tridon also is OE on Jeep. In addition, Tridon had been approved for OE use, although it was not actually purchased for such use, by General Motors, Chrysler, American Motors and International Harvester. By 1980 Tridon wipers were in use on 30% of Toyota, Subaru and Fiat. They were being tested on additional models made by General Motors, Datsun, Honda, Toyota, Subaru and Fiat. (CX 2103A; Shelton CX 3012Z-6 - Z-11; CX 1887B).

434. By the end of 1980, Tridon was qualified as a supplier for 90% of the windshield wiper applications of Ford. (CX 1887A). In 1980, Tridon presented a new type of blade to Ford for OE approval for 1982 models. (CX 1887A).

435. At the end of 1980, Tridon anticipated receiving additional business from Chrysler (CX 1887C). Tridon also had passed most wiper tests of GM's Fisher Body Division. (CX 1887B).

436. Tridon has received inquiries from OEMs about possibly manufacturing windshield wiper arms and it has considered that possibility. (Shelton CX 3012Z-100; CX 2114A; CX 1887E). Tridon is also planning to produce snow blades. (CX 1887H). [56]

437. Tridon is responsible for a major technological advance in windshield wipers through the development of a plastic superstructure which is resistant to road chemicals and retains its dimensional integrity. (Shelton CX 3012Z-22 - Z-23). Tridon was the first manufacturer of wipers to use a plastic superstructure. By 1980 such superstructures were being made by Anco, Trico, Roberk, Fram and Nefco. (Shelton CX 3012Z-23 - Z-24; Oshei 3013Z-135; RX 4003Z-65).

438. Not long after Tridon secured Ford's OEM business it took

steps to reenter the aftermarket. Tridon began actively distributing windshield wiper blades to the automotive aftermarket again in 1978. (Shelton 3012N–P). Tridon had plans at the end of 1980 to become a significant factor in the aftermarket for wipers. (Shelton CX 3012Y–Z).

439. In 1980, Tridon advertised that its refills fit blades manufactured by Trico, Anco, Nefco, Roberk, Pylon and Fram, and that none of those companies had refills which would fit Tridon blades. (CX 2103A; Shelton CX 3012Z–11).

440. In 1980, Tridon sold wipers both to WDs and to mass merchandisers. (Shelton CX 3012Z–27 - Z–28). Its products were sold to the aftermarket either through manufacturers representatives or, in the case of national accounts, by Tridon's own employees. (Shelton CX 3012Z–30 - Z–31). Tridon has 13 to 15 manufacturers representatives under contract, each of whom employs two to ten salesmen. (Shelton CX 3012Z–38).

441. During 1980 Tridon won the business of several mass merchants including Sears, Walmart and TG&Y, but Pylon won half of the Walmart business later that year. (Shelton CX 3012Z–31 - Z–32; Sullivan 428; Longman 570).

442. In October 1980, Tridon gave Sears buyers a tour of the new Oakville plant. The Sears buyers were impressed. (Shelton CX 3012Z–53 - Z–54). Tridon replaced Trico as Sears' source for wipers. This was about $1 million in business. (Sullivan 353, 428). Tridon sold the Sears account by emphasizing quality, service and a competitive price. (Shelton CX 3012Z–50).

443. Following up on its OE sales to Ford, Tridon since at least 1978 has attempted to sell Ford its wipers under the Motorcraft label for OES sales. (CX 2114; Shelton CX 3012Z–137 - Z–138). [57]

444. In late 1980 Tridon stepped up its efforts to sell wipers to WDs and program distributors. (Shelton CX 3012, Z–193, Z–142).

445. In 1980, Tridon was trying to obtain the wiper business, with a $5 million potential, of National Automotive Parts Association. (CX 1894A).

446. Tridon advertises its product as a short line which reduces inventory paperwork and requires less investment. (CX 1882H). Tridon's product fits 96% of imports and 99% of domestic cars. (Shelton CX 3012Z–224).

447. A document prepared by Tridon in April 1979 projected its growth in sales and profitability in the U.S. aftermarket. It projected pre-tax income growing from 5.11% in 1979 to 20.83% in 1983. Sales were expected to increase from 900,000 units in 1979 to 4.7 million units in 1983 (CX 2019I–M; Shelton CX 3012Z–84 - Z–85).

2. Pylon

448. Pylon projected a 25% increase in sales in 1981 and it projected that 1985 sales would be two and a half times as great as those in 1980. Pylon also projected that by 1985 the book value of the company would total $4.6 million, compared to $1.7 million in 1980. (RX 864).

449. Pylon's net profits after taxes for each of the years from 1976 through 1980 were: $226,000; $152,000; $256,000; $365,000; and $327,000. These profits as a percent of sales were 12.0%, 6.7%, 7.8%, 9.1%, and 8.4%. (RX 5026–revised).

450. Late in 1978, Pylon established a profit objective of 15% before taxes with a return on capital investment of 22%. Its long-term objective was to increase its sales 20% per year compounded while maintaining these profits. Pylon had met its long-term objective every year since 1973. (CX 1634D). By 1978, financial institutions were prepared to assist Pylon in achieving its growth objectives. (CX 1634D).

451. Pylon's 1981 pre-tax profit objective was 16.8% of sales. Long-range profit objectives continued to be 15% before taxes, and return on capital was targeted at 15%. Pylon continued to look for sales growth at 20% per year compounded. (CX 1637B).

452. Pylon is in no need of working capital and expects to continue to grow. (RX 827). [58]

453. Pylon's history is one of steadily improving the quality of its product. When it entered the windshield wiper business, Pylon worked with two chemical companies and at least three rubber companies in developing a suitable rubber compound. After three years it had a satisfactory compound. (Longman 522–23). STP spent about $200,000 over three years to improve the quality of the rubber. (Longman 526, 725).

454. Initially Pylon used a commercially available slitter. (Longman 532–33). Over the next three years Pylon developed its own slitter. (Longman 533–34).

455. As its market position improved, Pylon moved to a new plant in 1979. With a 54% increase in floor space almost doubling capacity, and with a land plan providing for an additional 50% increase in the future. (CX 1634X).

456. Pylon's largest account is K-Mart, which also is supplied by Trico. Pylon also sells to customers which are also supplied by Anco, including Times Square, Strauss R&S, Rose Auto Stores and Target. (Longman 549).

457. Pylon, as well as Tridon, has been gaining customers at the expense of Roberk. (Longman 650).

458. Another major customer of Pylon's is Montgomery Ward, which also carries Trico winter blades. (Longman 724 to 725).

459. Pylon employs 17 manufacturers representatives, which in turn employ 80 to 100 salesmen. (Longman 617). In 1978. Pylon sought new areas of distribution such as oil companies. (CX 1634E).

460. As part of its marketing strategy, Pylon set for itself the goal of introducing a new product every two years. (CX 1634Z-1). In 1980, Pylon advertised that "our wiper is undergoing some major design changes that will further enhance the value of our product." Pylon also expected to experience sales growth for its pumps, tubing kits and its new windshield wiper delay controls. (CX 1638A).

461. Pylon emphasizes that its packaging and displays allow the retailer to stock twice as much as Roberk and 70% more than Anco in the same amount of space. (CX 1650B-C).

462. In order to encourage prospective customers to switch, Pylon offered to stocklift Roberk wiper products at a major automotive feeder in November 1980 and told another potential customer that it would repack its Ideal inventory in Pylon packaging. (CX 1653B; CX 1656A). **[59]**

463. Pylon also has specially designed a merchandiser unit for use at food stores. (CX 1656B).

464. Pylon has taken numerous red front stores from Roberk and has increased volume from oil company accounts. (Longman 598; CX 1634E). In 1980, Pylon's sales manager stated: "In 1981 our main efforts will be aimed toward the retail segment of the industry. We have set secondary objectives of gaining a larger share of the service market." (CX 1637C). By 1980, at least 9% of Pylon's total sales were to jobbers and oil companies, which Pylon refers to as the "service" sector of the market. (CX 1637C).

3. Bosch

465. Bosch has the financial resources to expand in the windshield wiper market. (Shelton CX 3012U-W; Williams 934). The Robert Bosch Sales Corporation has a sales force of approximately 75 people for sale of products in the United States. (Heinemann CX 3003Z-35, Z-164).

466. In the past, Bosch distributed its products through import specialists. Bosch began changing its distribution method about 1978, from selling only to warehouses specializing in import vehicles to servicing full-line warehouses. (Fiene CX 3001Z-50 - Z-51).

467. By 1980, the vast majority of Bosch's WDs were full-line distributors. (Fiene CX 3001Y).

468. Bosch took additional steps to expand its windshield wiper business with OEMs in the United States. At the end of 1980, Bosch was supplying Chrysler with starting motors and hoped to sell Chrysler windshield wipers, spark plugs, a full line of electrical equipment

and a full line of fuel management systems. (Fiene CX 3001Z-27 - Z-28). Bosch supplied Volkswagen of America with a broad line of diesel and gasoline injection components, lamps, horns, blower fans, spark plugs, cranking motors and alternators and had plans to obtain OE acceptance of windshield wipers from VW. (Fiene CX 3001Z-29). By the end of 1980, Robert Bosch had contacted Volkswagen of America and Caterpillar Tractor in an effort to obtain acceptance of Bosch wipers as OE. (Fiene CX 3001Z-11).

469. Late in 1980, Robert Bosch proposed to increase its market share in the traditional channel in the United States by cutting its prices for wipers. (CX 1500P-S).

470. At the end of 1980, Bosch had plans to increase the breadth of its windshield wiper product line in the United [60] States. Its goal was "to expand our line offering and achieve additional penetration of the market." (Fiene CX 3001Z-7; Heinemann CX 3003Z-50 - Z-51). Bosch's planned expansion of its wipers was also to include applications for U.S. vehicle manufacturers. (Fiene CX 3001Z-8).

471. Bosch's plan anticipated that the total market unit sales of windshield wiper blades for import vehicles would increase from 13,650,000 in 1980 to 27,450,000 in 1985. It projected that unit sales of windshield wiper blades for imported cars sold through traditional WDs would increase from 10,323,000 in 1980 to 20,669,000 in 1985. (Heinemann CX 3003Z-91 - Z-95; CX 1500A-B).

472. Bosch's blade part numbers offered in its parts catalog rose from 15 part numbers in 1973 to 23 part numbers in 1979. (CX 1489Z-131; CX 1489H). By 1980, Bosch's wiper products would fit most European cars and also Japanese-built Champs, Colts, Datsuns, Hondas, Mazdas, Subarus and Toyotas. (CX 1493L-M).

473. Bosch originally confined spark plug sales to import applications but has since broadened the line to cover domestic vehicles. (Nelson 6172).

4. Ideal

474. As of 1980, Ideal had begun a program to develop 16-inch and 18-inch plastic windshield wiper blades. (CX 1573D). It also was considering the purchase of extrusion equipment to reduce costs. (CX 1573Y).

475. As of the end of 1980, Ideal planned to expand the Ideal line so that it would cover 95% of all applications and "make Ideal the equal of any competitor in the field." (CX 1573D).

5. Roberk

476. Roberk pioneered the pricing tactic of offering all wiper blades

at one price and pairs of refills at the price of a single blade. (Lopez CX 3000Z–28).

477. At the time of its entry it exploited the shortcomings of the marketing programs of Anco and Trico by offering the universal refill concept. (Lopez CX 3000Z–57).

478. Roberk also innovated the device of color coding refills and blades. It developed charts which enabled the consumer to select the right blade without the assistance of a sales person. (Frank 2586–87). [61]

479. Roberk's growth in sales and market share persisted up to the end of 1980. (RX 5003A; RX 5004). Roberk continues to be profitable and financially strong. (RX 5025).

480. Roberk has been trying to sell its windshield wipers to traditional accounts. (Lopez CX 3000Z–73). Roberk continues to share in the mass merchandisers' growing volume of business. (Lopez CX 3000Z–109 - Z–110).

6. Fram

481. In 1978 Fram had 245 people employed in its direct factory sales force. (CX 1412C).

482. Fram plans to expand its windshield wiper line for the year 1979 included increasing efforts to secure OES business, improving the quality features of the windshield wiper product and expanding Fram's share of the market. (CX 1440B).

483. Fram's long-range plan projected 10% annual growth in its windshield wiper product volume for 1977 through 1985. (CX 1473B). Fram's management was more optimistic about the future of its wipers in 1980 than it was in 1979. (CX 1473A).

484. Late in 1979 Fram was designing new refills to fit Trico, Anco and Tridon windshield wiper blades. That was to entail a capital investment of $70,250. (CX 1455A).

485. In early 1978 Fram reduced the prices of its wipers. Prices were reduced for both blades and refills (RX 243–44). In April 1979 Fram planned to increase its prices on wipers by 10%, although an increase of 30% to 40% was necessary to bring wiper blade profits in line with the profits of Fram's other products. (RX 257A).

486. Fram had no plans to cease selling wipers as of the end of 1980. (Slight 6581).

7. Nefco

487. In 1978 Nefco's line included blades. (Neff 828, 849).

488. Nefco had plans as of December 31, 1980 to add plastic windshield wiper blades to its product line. (Shelton CX 3012Z–24; Nelson

6217–18). Nefco added windshield washer pumps to its product line in 1980. (Nelson 6219). [62]

P. *Potential Entrants*

1. Acushnet Company

489. Acushnet Company ("Acushnet") is a wholly-owned subsidiary of American Brands. American Brands has experience in consumer marketing. (Harrington 1101–02).

490. The rubber division of Acushnet had sales of about $50 million in 1980. (Harrington 1063). The customers of Acushnet Company include General Motors, Ford, Chrysler and Caterpillar. (Harrington 1064–65).

491. Acushnet manufactures the rubber elements used in windshield wiper blades and refills for Trico and Fram. That accounted for between five and ten percent of the rubber division's business in 1980. (Harrington 1067).

492. Acushnet develops the rubber compound used in the manufacture of the rubber elements. That is done pursuant to specifications provided by the customer. (Harrington 1071–72).

493. Acushnet has the capacity to slit rubber elements. (Harrington 1077–78). Acushnet also has injection molding and transfer molding capability. The rubber division considered using an extrusion process for the manufacture of rubber elements for wiper blades in 1977. (Harrington 1079).

494. By 1980 Trico was extruding some of its own rubber elements. (Harrington 1095). For that reason, Trico's demands for elements from Acushnet have declined. (Harrington 1096).

495. From 1974 to 1977 Acushnet spent $750,000 on research in developing a rubber compound to be used in entering the windshield wiper market. (Harrington 1086).

496. In 1977, 1978 and 1980 Acushnet decided against entering the windshield wiper business. Several market studies were done with respect to these decisions. Acushnet relied on one of them, the Yankelovich study, which concluded that there is intense competition among manufacturers of wipers in the United States. (Harrington 1085–99).

497. In 1980 one of the reasons for not entering was "the fact that the wiper sales are down below what they were several years ago." (Harrington 1088). A task force studied the possibilities. Acushnet decided not to enter because it did not wish to alienate current wiper customers, it was not established in distribution channels, and it did not look like a growth market. (Harrington 1089). [63]

2. Dana Corporation

498. Dana Corporation ("Dana") manufactures parts for trucks and off-highway motor vehicles and sells to the OE and replacement markets. (RX 302B).

499. Dana's net sales for 1980 were $2.5 billion. (RX 303N). Dana's aftermarket sales in 1980 were $800–900 million. (Hirsch 4182).

500. Among the parts sold by Dana to the aftermarket are drive train products, universal joints, clutches, transmission products, axles, engine components of gaskets piston rings and pistons. In the fall of 1979 Dana acquired Wix filters which had sales in 1980 of about $150 million. (Hirsch 4182; 4188–89).

501. Dana sells to WDs, to mass merchandisers, and to national accounts. (Hirsch 4184). In 1980 Dana sold to around 2,000 WDs. It sold to about 200 mass merchandisers and national accounts. (Hirsch 4187–88).

502. Dana has experience with the following production processes which are used in the manufacture of wipers: rubber extruding and molding; slitting or trimming of rubber; the use of punch presses for metal stamping: use of thread-rolling equipment; the use of degreasing equipment; and employment of tool and die makers. In its manufacturing processes Dana is involved in light assembly operations. (Hirsch 4185–86).

503. From 1970 through the end of 1980 Dana made 18 to 20 acquisitions of domestic companies, with two companies having sales of less than $3 million. (Hirsch 4188, 4199–200).

504. As of December 1980, Dana had guidelines for corporate acquisitions, looking towards growth through acquisition of companies in the automotive aftermarket. (Hirsch 4190–93).

505. Dana was interested in Wix Corporation because Wix provided Dana an opportunity to sell in the aftermarket. (Hirsch 4201–02).

506. In the opinion of Dana's vice president for corporate planning, windshield blades and refills would fit the Wix marketing effort because they are distributed through the same markets. (Hirsch 4202).

507. Since acquiring Wix in 1979, Dana is interested in acquiring a windshield wiper manufacturer. (Hirsch 4202–03). [64]

508. One of the factors which Dana would seek in an acquisition candidate is growth potential. (Hirsch 4193). Another factor sought by Dana would be whether the acquisition candidate fit with Dana's operations. (Hirsch 4194).

509. Dana was not a potential entrant at the time of the acquisition. Dana is now a potential entrant. (Hirsch 4203).

3. The Echlin Manufacturing Company

510. Echlin's principal products are automotive electrical parts, brake systems parts, and other related automotive products. (RX 464B).

511. Echlin's net sales in 1980 were $301,000,000. (RX 454C).

512. Echlin's customer accounts in the replacement market include WDs and jobbers, mass merchandisers, and national accounts. (RX 463J).

513. In 1980 Echlin employed 217 sales personnel. In addition, it used 92 manufacturers representatives. (RX 463K).

514. Echlin has experience with most of the processes involved in the manufacture of wipers. For example, it has experience with rubber extruding and molding, thermo-plastic extruding and molding, use of metal stamping punch presses, use of thread-rolling equipment, use of degreasing equipment and light assembly equipment. In addition it employs tool and die makers. (RX 463M).

515. Echlin's principal methods of distribution are through WDs, retailers, oil companies, automotive replacement parts manufacturers and trailer manufacturers. (RX 464B).

516. Echlin has an active corporate acquisition program. Over an extended period of time through the end of 1980 Echlin made approximately 20 corporate acquisitions. Those companies are practically all manufacturers of replacement parts for motor vehicles. (Hancock 3687).

517. Echlin's acquisition program is directed at manufacturers of parts. Echlin looks for parts that have a high incidence of replacement—parts that tend to wear out with the use of the car—as opposed to crash parts. (Hancock 3689).

518. In the early 1970's, Echlin was seriously interested in the acquisition of Roberk, to the point of discussing a sales [65] price with Norman Berke, then the owner of Roberk. The reason for Echlin's interest was that windshield wipers blades fit with Echlin's interest in safety. (Hancock 3697).

519. In the mid-1970's, Echlin seriously considered acquisition of the Arman Company. Echlin sent a number of people to visit Arman, including its vice president of corporate development, Mr. Hancock, on two occasions. It also commissioned a study by Price, Waterhouse of Arman's financial statements, which cost Echlin $30,000–$40,000. (Hancock 3706–07).

520. Echlin's objective in considering Arman was to participate in the market outside the United States which was growing at a faster rate than the U.S. replacement market. (Hancock 3708). Echlin of-

fered to purchase Arman, but its offer was not high enough for Arman's owners. (Hancock 3708–09).

521. Echlin considered acquisition of Anco before 1966, in 1975 and in 1978. (Hancock 3709–10, 3716).

522. In 1975, Echlin conducted a financial study of Anco and believed that it had declining earnings, flat sales volume from 1972 to 1974, negative cash flow, inventory buildup and deterioration of financial ratios. (RX 421A–B).

523. In February 1978, Echlin conducted another review of Anco for possible acquisition. Echlin reviewed a large number of documents supplied by Anco and sent a team consisting of personnel, marketing and engineering employees and top officers to tour Anco's plants and to discuss Anco's business with its managers. (RX 430; Hancock 3716–18).

524. An Echlin report on March 11, 1978, concluded that, except for a dramatic development like Anco's taking NAPA's business from Trico, "the prospects for growing much faster than the market as a whole do not appear bright," and questioned what impact the introduction of plastic blades would have upon metal blades. (RX 434C).

525. Echlin decided that it was not willing to pay more than $32 million to purchase Anco. Based upon its study of the assets and flow of earnings of Anco, Echlin was unwilling to pay more because that would likely dilute the position of its existing shareholders. (Hancock 3774–75; RX 445A).

526. Starting in 1978 Echlin also considered the possibility of acquiring Pylon. Mr. Hancock, Echlin's vice president for corporate development, visited Pylon's plant, studied documents provided by Pylon and held discussions with **[66]** Mr. Longman of Pylon. (Hancock 3726–27). Mr. Hancock was favorably impressed by Pylon. Mr. Hancock reacted favorably to Pylon's year-by-year sales growth, which went from $2 million to $3 million to $4 million, successively. (Hancock 3730). Mr. Hancock was told that among Pylon's customers were Wards, K-Mart, Mobil and Getty. (Hancock 3731; RX 445A).

527. By memorandum of May 16, 1979, Mr. Hancock reported to Echlin's chief executive about his study of Pylon. (Hancock 3728–29). Echlin's chairman advised Mr. Hancock that he wanted him to move ahead on the discussions. By letter of May 1, 1979 to Rodney Longman of Pylon, Mr. Hancock advised him that "we are interested in pursuing the possibility of acquiring Pylon." He closed by saying "Rod, we have an honest interest. How can we proceed?" (RX 446). Because of a personal tragedy in Mr. Hancock's family, further discussions with Mr. Longman were neglected and the deal fell through. (Hancock 3749).

4. IC Industries

528. IC Industries ("IC") is a diversified company. IC's 1978 sales were $2,670,000,462. In 1980, IC had sales of $4,141,000,000. (RX 678C).

529. A subsidiary, Midas International Corporation, is a large manufacturer and distributor of auto exhaust systems and also franchises exhaust systems stores. (Lawless 3635). In 1980, Midas had 1,360 automotive shops worldwide. In 1980, IC Industries' net sales of automotive parts were $43,000,000 (RX 680B; RX 678T).

530. Another subsidiary, Abex Corporation, makes tire molds, friction materials for brakes and disc brake pads, and heavy castings (Lawless 3635). Signal-Stat, a division of Abex, makes reflectors, flashers and turn signals. (Lawless 3636).

531. More than $15,000,000 of IC's automotive parts sales in 1980 were to 373 WDs and jobbers. Another $7.2 million of automotive parts sales were to one national account. (RX 680C).

532. IC has experience with several of the processes used in windshield wiper manufacturing facilities. It uses thermosetting resin in manufacturing friction material. It uses metal stamping punch presses and employs tool makers and it has light assembly operations. (RX 680D).

533. IC negotiated with the Paul Journee Company to acquire it or to obtain some distribution from it. Those negotiations were unsuccessful. (Lawless 3637). The negotiations were thwarted by the French government. (Glassman 7349). [67]

534. IC was interested in acquiring Anco in the early 1970's. During the period 1976-1978, IC's interest in acquiring Anco was renewed. (Lawless 3637).

535. By letter of October 9, 1975, IC's director of corporate development proposed an acquisition of The Anderson Company. (RX 633). By letter of February 27, 1976, the president and chief operating officer of IC, Stanley Hillman, offered to buy all the shares of Anco owned by The Anderson Foundation. (RX 645). On April 14, 1976, Anco's president, Edward Larson, advised IC that the trustees of The Anderson Foundation had determined instead to undertake an examination of the potential of Anco for growth and improved profitability. (RX 649). By letter of April 28, 1976, Mr. Hillman responded to Mr. Larson's letter with a new, higher offer, 125% of net worth, for the purchase of the shares of Anco. (RX 650). In a letter dated May 6, 1976, Mr. Larson advised Mr. Hillman that the trustees were undertaking a study concerning the potential of Anco and that when the study was completed they would be glad to talk with IC and other companies. (RX 651).

536. During the 1970's IC looked at over 200 automotive company acquisitions. (Lawless 3674). Mr. Hillman made offers to purchase only a few of those companies. (Lawless 3676, 3681).

537. Among companies acquired by IC was at least one whose annual sales were in the $5–6 million range. (Lawless 3664–65).

538. IC's interest in wipers was not confined to acquisition of a leading firm. It pursued Paul Journee and it pursued companies with sales in the $5–6 million range in other markets. (Lawless 3665, 67).

5. IT&T

539. IT&T is a diversified company with total sales in 1980 of $23.8 billion and sales of automotive products of $1.7 billion. (RX 712E).

540. IT&T manufactures automotive products including brake systems, suspension systems, body and chassis components and electromechanical and electronic components. It is an original equipment market supplier to automotive manufacturers worldwide, and it is also a manufacturer and distributor in the aftermarket. (RX 712F–G). [68]

541. IT&T has several automotive organizations active in the United States aftermarket. One is a group called ADD, an automotive distributor organization. (Gillberg 3915–16). IT&T also sells to an organization of program jobbers called Auto-Wize. (Gillberg 3916). WAWD, which stands for Western Automotive Warehouse Distributors, is engaged in importing parts for U.S. imported cars. Aimco makes brake parts. (Gillberg 3917). Hancock Corporation makes a variety of metal frames such as seat frames and seat adjustments. Lester Industries, acquired in 1979, is engaged in aluminum diecasting for cars. IT&T's suspension division makes suspension parts for automobiles in the United States. (Gillberg 3918).

542. IT&T subsidiaries in Europe manufacture automotive parts: Alfred Teves, the world's largest manufacturer of brake parts, had sales in 1980 of $800 million. (Gillberg 3919–20). IT&T's Dutch subsidiary, Koni, manufactures high performance shock absorbers with annual sales of about $70–75 million. The IT&T Automotive Italian Organization manufactures shock absorbers, mufflers and plastic parts such as steering wheels, seats, dashboards with sales in 1980 of $250 million. IT&T also owns 1–2–3 Auto Service, a muffler franchise company in Germany. (Gillberg 3921–22).

543. Another IT&T subsidiary is SWF, a German company, which had sales in 1980 of $250 million. SWF manufactures wipers systems, including electrical motors, linkage, arms and blades. In 1980 SWF sold to Volkswagen-Audi, Mercedes Benz, BMW, Ford, General Motors in small amounts, Renault, Volvo and Opel. (Gillberg 3923–24).

544. SWF imported its wipers into the United States in 1976–1977

for replacement of wipers on imported cars like Volkswagen. SWF sold through the WAWD organization, but was unsuccessful. SWF priced the wipers to compete with OES blades, but it could not compete with lower priced blades from Brazil and Taiwan. (Gillberg 3927–29).

545. Prior to the end of 1980, IT&T Automotive was considering manufacturing wiper systems in North America. There were operations review meetings in IT&T where that was discussed. (Gillberg 3931).

6. Premier Rubber Company

546. Premier Rubber Company ("Premier") is a division of Eagle-Picher Industries ("Eagle-Picher") which had net sales in 1978 of $526.5 million and net income of $27.8 million. Eagle-Picher is divided into groups. In 1978, sales by the automotive group were $161.3 million, earning $19.3 million before taxes. [69] Automotive group sales nearly doubled from 1974 to 1978. (RX 378C; RX 378–I).

547. The Eagle-Picher automotive group manufactures vibration dampening assemblies and other precision machine parts such as steering gear components, adjustable steering wheel parts and power steering pump housings. (RX 378S).

548. Premier manufactures rubber products, including components for shock absorbers, windshield wiper elements, oil industry products and rubber products for appliances, heavy trucks and agricultural equipment. (Singleton 3460).

549. Premier is a fully integrated rubber company which purchases basic raw ingredients and processes them into a completed product. It has Banburys, mills, calendars, extruders and presses for rubber processing. (Singleton 3461).

550. Premier formulates the rubber compounds used in the manufacture of windshield wiper elements. (Singleton 3463). Premier has been supplying rubber elements to Anco since 1928, to the Ideal Corporation since 1979, and to Roberk since 1977. (Singleton 3462). About 85% of Premier's sales of rubber elements is to Anco. (Singleton 3513).

551. In addition to buying from Premier by 1980, the Roberk Division of Parker-Hannifin had begun to produce some of its own rubber elements. (Singleton 3462–63).

552. Premier develops its rubber compound to meet the specifications of its customers and uses different rubber compounds for the wiper elements manufactured for Anco, Roberk and Ideal. (Singleton 3463–64).

553. About 1976, Premier considered manufacturing windshield wiper refills. It did so because it had excess capacity after Anco start-

ed buying part of its rubber elements from Jordan Products Company. (Singleton 3468, 3479).

554. In the course of its investigation, Premier concluded that its entry into the windshield wiper aftermarket was feasible. But Premier decided not to enter the wiper business because Premier started to sell to Roberk which solved its problem of overcapacity without actually entering the windshield wiper business. (Singleton 3469).

555. Premier perceived that, by providing refills in three different sizes, it could cover 95% of the total market for passenger cars operating in the United States. (RX 322E). [70]

556. In deciding whether to enter the windshield wiper business, Premier considered refill designs, analyzed the pressure patterns of existing wiper blade products, developed a schedule of manufacturing processes, and surveyed retail prices of competitors. (RX 322Z - Z–10).

557. Premier developed detailed drawings of assembly and individual components for the manufacture of wiper products. (Singleton 3472; RX 322B).

558. Premier sent letters to various outside companies asking them to quote to supply windshield wiper refill parts. (RX 347A - Z–14; Singleton 3473–74). The responses led Premier to conclude that it could have obtained a source for the component parts needed to manufacture and sell windshield wiper refills at a competitive price. (Singleton 3475).

7. Purolator, Inc.

559. Purolator, Inc. ("Purolator") is a diversified company with revenues in 1980 of $561,000,000. Purolator's Products Group manufactures automotive products, principally filters and closure caps for automotive vehicles which it sells to original equipment manufacturers and to the automotive aftermarket. (RX 793B, I).

560. Purolator's subsidiary, Stant, Inc., is a manufacturer and marketer of fuel tank caps, radiator caps and oil filter caps for use on automobiles which it sells to original equipment manufacturers and in the automotive aftermarket. (RX 793J).

561. Purolator has been interested in acquiring a windshield wiper company for more than 20 years, and contacted Anco in 1967 about a possible acquisition. (Bober 4218).

562. In 1976 Purolator marketed a windshield wiper product purchased from Pylon under the Purolator brand name. (Bober 4218–19). Under that agreement, refills were shipped to Purolator already packaged in individual boxes bearing Purolator colors and the Purolator brand name. (RX 745). The program was not a success. (RX 762).

563. In April of 1978, when Purolator learned that Anco was for sale it sent a check for $1 million to The Anderson Foundation to make

Purolator eligible to receive information with regard to Anderson and to become a potential bidder. (Bober 4227; RX 766–70). Purolator's evaluation of Anco for possible acquisition was approved by the Purolator board. (RX 771). Purolator eventually dropped out of the bidding for Anco because it thought that the price was too high. (Bober 4232). The $1 million was returned, with interest. (Bober 4261). [71]

564. In 1979 Purolator was contacted by a broker who wanted to license plastic wiper blades for sale to OEM. (RX 775; Bober 4235). Purolator was interested but found that the car manufacturers were not. (RX 776–78; Bober 4241).

565. In 1980, the chief executive of Pylon, Mr. Longman, asked Mr. Landow, the senior vice president of the Purolator Filter Division, to consider another wiper blade promotion and they also discussed the possible acquisition of Pylon. (Bober 4242). Mr. Landow was not authorized to make acquisitions. (Bober 4244, 4267).

566. Mr. Longman sent a secrecy agreement which would have required Purolator to make royalty payments over a number of years in the event that it subsequently entered the windshield wiper business. Purolator refused to execute the agreement. (Bober 4243–45; 4269).

567. In 1980, to assist it in deciding whether to again buy and sell wiper products under the Purolator name, the Purolator Filter Division sent a questionnaire to some of its customers (RX 784; RX 789; Bober 4243–45) and requested a trade association to prepare a market study of the windshield wiper business. (RX 761; Bober 4250).

8. Sprague Devices, Inc.

568. Sprague Devices, Inc. ("Sprague") and its predecessors manufactured air pressure wiper motors and controls for trucks and buses for forty years. About 1978 Sprague began selling heavy duty wiper arms and blades which are manufactured by Anco for trucks and buses. (CX 238B, CX 775A; Oshei RX 4003Z–162 - Z–165).

569. Premier Rubber Corporation perceived Sprague as a manufacturer of wiper blades for original equipment use when Premier studied entry into the wiper aftermarket. (RX 322P–Q; Danielson 3831, 3833).

570. Stewart-Warner Corporation considered acquiring Sprague which it perceived as a wiper system producer. (Danielson 3831, 3833).

571. Sprague is not a potential entrant. [72]

9. Stewart-Warner Corporation

572. The Stewart-Warner Corporation ("Stewart-Warner") makes and sells various automotive products, including radiators, heaters,

switches, meters and gauges, which it sells in the aftermarket to program distributors, oil companies, jobbers and mass merchants. It had sales in 1980 of about $336 million. (Davidson 3804–05, 3819–21).

573. Some of Stewart-Warner's automotive products have been developed by internal expansion including its lubrication systems and instrument systems. (Danielson 3836–37).

574. In 1978, Stewart-Warner acquired Icknield Instruments Limited, a manufacturer of automotive instruments, including speedometers, tachometers and gauges. Stewart-Warner acquired the Thor Division in 1973. Cincinnati Rubber was a part of the Thor acquisition. (Danielson 3827–28).

575. The Cincinnati Rubber Company was engaged in rubber molding. Other manufacturing processes used by wiper manufacturers and also employed by Stewart-Warner are metal stamping plastic molding, and light assembly. (Danielson 3807).

576. Since at least 1977, Stewart-Warner has been interested in acquiring among others, automotive parts companies with a net worth of at least $2 million. (Davidson 3826).

577. Around 1978, the Cincinnati Rubber Company investigated entry into the windshield wiper business and concluded that they could manufacture a windshield wiper product comparable to those already on the market. (Danielson 3808).

578. Two prototypes of blades were developed and tested in the laboratory. (Davidson 3831–32). While no patents blocked Stewart-Warner from getting into the business (Davidson 3837–38) they concluded that they needed a patentable wiper because Cincinnati Rubber Company's technology was low volume specialty and they needed something different to get a price that would cover their costs. (Danielson 3833).

579. Stewart-Warner had several meetings concerning acquisition of Sprague Devices, which makes wiper systems. It discussed possible acquisition prices with the merger broker, but not with Sprague officers. (Danielson 3838). Sprague decided that it was not interested in the acquisition. (Danielson 3814–15, 3838–39).

580. Stewart-Warner discussed participating with an English company, Lucas Industries, in the sale of automotive parts, including wipers, in the U.S. (Danielson 3814–15). It had two meetings with Lucas executives in 1978 and 1979 to discuss an [73] association under which Lucas could sell its automotive products, but no deal was ever reached. (Danielson 3815, 3830).

581. Stewart-Warner sold Cincinatti Rubber to a private individual in August 1979, and no longer has any interest in manufacturing wipers. (Danielson 3833–35).

582. At the time of the acquisition, Stewart-Warner was a potential

entrant. After 1979, Stewart-Warner was no longer a potential entrant.

10. Tenneco, Inc.

583. Tenneco, Inc. ("Tenneco") is a diversified corporation which includes an automotive parts business. (RX 949–C). Tenneco's net revenues in 1980 amounted to $13.2 billion. Sales of its automotive parts operations, Tenneco Automotive, which includes the Walker Manufacturing Division, Monroe Auto Equipment Company, and Speedy King Muffler (RX 950H), amounted to $795 million. (RX 949D).

584. The Walker Division manufactured automotive exhaust systems and parts, emission control devices and jacks and 80% of its sales are to the automotive aftermarket. (RX 949T). The Monroe Auto Equipment Company manufactures shock absorbers and 80% of its sales are to the automotive aftermarket. (RX 949U).

585. Monroe has experience in many of the processes used in manufacturing wipers. It uses metal stamping punch presses, thread rolling equipment, cold heading equipment, degreasing equipment and light assembly equipment. Monroe also employs tooling, die and mold makers. (Nelson 6103–04).

586. In 1980, Monroe employed over 200 sales people and used 18 independent manufacturers representatives (RX 951H; RX 953C).

587. Walker had manufacturing experience with each of the following processes: rubber extruding, thermo-plastic extruding, slitting or trimming of rubber, as well as the use of punch presses, thread-rolling, cold heading and degreasing equipment, tool, die or mold makers and light assembly operations. (RX 921G–H; RX 953C).

588. In 1969 Monroe, then an independent company, and Anco formed a Belgian joint venture company to manufacture and sell wipers throughout Europe. That venture continued until about 1978. (Lipford 3872–73). [74]

589. In 1972, Monroe offered to purchase the stock of Anco held by The Anderson Foundation for $23 per share. (RX 926A; Lipford 3874). Monroe's offer was not accepted. (Lipford 3875).

590. In 1974, Monroe again considered Anco as an acquisition candidate. (RX 933A; Lipford 3877–78). As a result of Monroe's study of the technological aspects of windshield wipers production, it concluded that wipers are not a technically sophisticated product, the manufacturing processes involved are not technically sophisticated, and the product is not subject to easy obsolescence by new technology. (Lipford 3878).

591. The Monroe Auto Equipment Company was acquired by Tenneco, Inc. in 1977. (Lipford 3871).

592. In 1978, Tenneco was invited to bid to purchase Anco. It concluded that it could not pay book value ($22 million) or more without a diluting effect on Tenneco earnings per share. (RX 939). Tenneco did not bid. (Lipford 3882).

593. In May 1978, the director of corporate development at Tenneco Automotive reviewed the financial operations of the Trico Products Corporation. (Acuff 3895; RX 941).

594. In 1979, a market survey of the windshield wiper industry was done at the request of the director of corporate development for the automotive parts division, Tenneco Automotive. (Acuff 3892–93).

595. Tenneco employs in its own plants most of the manufacturing processes used by wiper manufacturers. (Nelson 6103–04).

11. Auto Manufacturers

596. Delco Products Division of General Motors Corporation ("Delco") sells wiper motors and washer pumps to the car divisions of General Motors and to the General Motors Parts Department for resale to dealers as original equipment service. (George 744).

597. A.C. Delco Division of General Motors and its predecessor organizations ("A.C. Delco") have sold automotive products to the aftermarket through WDs. (George 746). A.C. Delco purchases the wipers which it sells. (George 747).

598. General Motors has integrated backwards into many products installed in cars, including cruise control, tire [75] pressure sensing systems, catalytic converters, temperature sensors, citizen band units, tape players, air conditioning systems, and electronic engine controls. (Nelson 6476–78).

599. Delco began working on development of a windshield wiper blade about 1956 and continued up to 1965. (George 755, 761).

600. General Motors developed a windshield wiper product which was tested on cars. The pilot program consisted of about 10,000 blades, used on 1958 or 1959 model Chevrolets. (George 755).

601. Delco tested its prototype windshield wiper blade in the laboratory and concluded that it was superior to the Trico and Anco blades then being purchased for original equipment use. It had superior wipe and durability. (George 758–59).

602. The research group at Delco compounded a rubber formula which, based on tests, was superior to the wiper element used by Anco and Trico. (George 761–63).

603. General Motors developed its own slitter from existing equipment which was commercially available. (George 766). When the work was completed Delco felt that its blades had a better edge than those of existing suppliers. (George 767).

604. General Motors conducted a cost study of the prototype wind-

shield wiper blade which it had developed and decided in 1965 not to produce it because it cost more than the blades they could buy from Anco and Trico. (George 760–61).

605. Between 1969 and 1972, Delco looked for a second time at the possibility of manufacturing windshield wiper arms and blades and refills for sale to the O.E. and replacement markets. (George 749, 770–74).

606. A.C. Delco felt that it could get a 20% share of the wiper aftermarket in two years selling to WDs and that it could cover 98.93% of U.S. and foreign passenger cars with 19 sizes. (CX 1514A–B, CX 1516A). Because several patents were expiring Delco thought it had the opportunity to modify its design to reduce costs. (George 769–70).

607. Delco concluded in 1972 that while its blade was superior to the blades General Motors was buying from Anco and Trico it cost too much to make and should not be produced. (George 773–74). [76]

608. Ford Motor Company sells parts to Ford and Lincoln-Mercury dealers under the "Ford" and "Motorcraft" brands, and to aftermarket customers, including WDs, national accounts, hardware stores, drug chains and mass merchandising chains, under the "Motorcraft" brand. (Mitzel 450–52).

609. Ford sells Ford-branded wipers to its dealers. Ford dealers primarily purchase Ford branded wiper products for warranty repairs. (Mitzel 451–52).

610. Ford has more than 200 sales people. It sells to about 800 WDs. (Mitzel 453). It operates about 17 parts distribution centers. (Mitzel 454).

611. In 1979, Ford analyzed the possibility of selling wipers to the aftermarket as a Motorcraft brand. (Mitzel 455, 458–59). This private label line would be made by Tridon. (Mitzel CX 2020C).

612. The line of six blades and six refills under the Motorcraft label would fit all domestic car and light trucks and most imported vehicles. Each blade was to be supplied with adaptor clips to fit various arms. (CX 2022B–C). The line of wipers would not have met Ford's own original equipment specifications. (Mitzel 474–77).

613. Ford decided not to proceed with the analysis of the Motorcraft branded wiper product for the independent aftermarket because other products offered greater sales potential. (Mitzel 463–64).

614. Ford is not a potential entrant.

Q. *Likelihood of Champion Entering The U.S. Wiper Replacement Market in 1978*

1. Champion's Expansion History

615. From a single spark plug plant established in the United States in the early 1900's (CX 988H; Stranahan CX 3007H), Champion has grown to become the worldwide leader in spark plug sales, with fourteen spark plug plants and nine ceramic plants distributing spark plugs in more than 150 countries around the world. (Hoyt CX 3009Z-122; Surface CX 3005Z-83). [77]

616. Champion's expansion in spark plugs was accomplished entirely through internal expansion. (Surface CX 3005Z-84; Brotje 4493; CX 3011Z-14 - Z-15; Emrick RX 4000Z-23 - Z-24; Senez RX 4004Z-49; Stranahan CX 3007F-R).

617. Champion starts out in some markets by sales and service companies to handle the importation and distribution of its products. (CX 610A; CX 972G; Stranahan CX 3007Z-15; CX 975G; Senez RX 4004Z-24).

618. Champion built spark plug plants in anticipation of future growth. It generally would import into a market until demand would justify construction of a plant. Plants then were built with the expectation that they would not reach full capacity utilization for up to 15 years. (Stranahan CX 3007W-X, Z-4, Z-13).

619. Champion built plants in Mexico, Venezuela, South Africa and New Zealand because those countries would not permit imported spark plugs. (Brotje 4495).

620. As it had in spark plugs, Champion pursued a policy of internal expansion with its two subsidiaries involved in lines of business other than spark plugs or wipers. (CX 971K; CX 972H).

2. Champion's Incentive to Enter the Wiper Market

621. In the early 1970's Champion's top corporate management believed that spark plug sales would grow at a slower rate in the future. (Surface CX 3005Z-73 - Z-14, Z-79; Stranahan CX 3007Z-2; Emrick RX 4000Z-16 - Z-18).

622. Champion's top management thought that Champion should diversify. (Surface CX 3005Z-73 - Z-74; Senez RX 4004Z-79 - Z-87; CX 12A).

623. Prior to the Anco acquisition, Champion was optimistic about the growth potential of the U.S. wiper replacement market. (CX 157A, D; CX 147A; CX 111A-B; CX 22A-C). [78]

624. Champion was aware of that growth potential and of the low level of consumer advertising of wipers. Champion research in the mid-1970's indicated that consumers replaced wiper blades only once

every three years rather than annually as recommended. (CX 22A–C; CX 23A; CX 111M; CX 159; CX 169J; CX 494).

625. Champion viewed the United States wiper replacement market as having more growth potential than the replacement spark plug market, either in the U.S. or in Europe. (CX 111A; Brotje CX 3011Z–113 - Z–114; CX 157A). In 1971, wipers were projected to have the second highest growth rate of 31 automotive parts lines, with an annual growth rate of 9.9%, more than double the predicted spark plug sales of 4.5%. (CX 23B).

626. Champion's top management recognized that wipers and spark plugs are compatible lines of business. (CX 44B–C; CX 12A; CX 41B; 171A).

627. Spark plugs and wipers are amenable to the same promotion, merchandising and advertising techniques. (CX 111A; CX 454Z–154; CX 497B; CX 713–I).

628. After the acquisition, the Champion and Anco sales forces merged, and the sales persons now carry both product lines. (Hoyt CX 3009Z–125; Lindeen 2722–23).

3. Champion's Interest in Wipers

629. In 1967, Anco was one of seven companies Champion was interested in acquiring but discussions were not active. In the previous several years Champion had examined twenty-three other companies including Trico, for possible acquisition but had abandoned the effort. (CX 1A–D; CX 16B–C).

630. In 1972, Richard E. Surface, Champion's vice president and director of organizational planning and a member of the executive committee contacted Anco to determine if it was available for acquisition. Anco was not then available. (Surface CX 3005Z–66 - Z–67).

631. In 1973, Champion's broker approached Trico about a possible acquisition but Trico was not interested. (CX 8A–F; CX 9A–C; CX 1814–18; Surface CX 3005Z–67 - Z–69).

632. Arman first came to Champion's attention in late 1974. Stephano Cocchiglia, then Champion's assistant managing director for Europe, suggested that preliminary contacts be initiated with Arman. (CX 12A–B). [79]

633. Throughout 1975, Champion pursued the Arman acquisition. (CX 14B; CX 15A–B; CX 17A–B; CX 19B; CX 20A–0; CX 24A–C; CX 26A–C; CX 30A).

634. In September 1975 Mr. Brotje, Champion's executive vice president and director of finance, advised Mr. Stranahan about the factors to be considered in deciding whether to acquire Arman:

> Another consideration is what plans, if any, do we have for manufacturing and selling

windshield wipers in the U.S.? If none, can it be said that Arman has enough potential that it is a good investment even if it is never brought into the U.S.? If there is any thought of introducing windshield wipers into the U.S. market, we should know the present size of the U.S. market and its growth potential. Perhaps we should ask Champion's sales department what they know about this market.

(CX 26C).

635. In August 1975, at Mr. Surface's direction (Surface CX 3006Z-79 - Z-80), a memorandum was prepared discussing the size of the United States wiper replacement market, the channels of distribution, the percentage of self installation versus professional installation, and the occasion and timing of purchase. The report also discussed Anco's leading position in the replacement market, its apparent average sales price per blade and the frequency of replacement of blades. (CX 22A-C). Shortly thereafter, Champion had a service station mail panel survey conducted in the United States for information on inventory and sales of two products—wipers and spark plugs. (CX 34A-C; Hoyt CX 3009Z-75 - Z-76).

636. Mr. Stranahan declined to purchase Arman in May of 1976 because of the unstable political and economic situation in Italy. (CX 36).

637. Champion then considered acquiring Paul Journee ("P.J."), the leading French wiper manufacturer. (CX 37A; CX 39A-O; CX 40A-D). Mr. Senez, then Champion's managing director of European operations, met with representatives of Paul Journee and its parent, the Neiman Group, in mid-1976. (CX 39A). [80]

638. Mr. Senez visited Paul Journee's facilities and found them to be unimpressive. (CX 42B, D). Mr. Surface provided to Mr. Stranahan a preliminary report on Paul Journee concerning its sales, customers and manufacturing facilities. (CX 40B-D). He also reported to Mr. Stranahan that Paul Journee, the fourth largest firm in Europe behind Trico, Bosch and Arman, wanted to sell to Champion "because of fear we would be a competitor." (CX 44B).

639. While negotiations with Paul Journee were continuing, Arman advised Champion that they would be willing to talk again about the possible acquisition. Mr. Surface suggested to Mr. Stranahan that negotiations with Arman be resumed. (CX 44A-C). He noted that Champion's top level international management officials were "still positive on adding wiper blades" and that other international managers in South Africa, Venezuela, Mexico and Japan "all expressed disappointment in losing Arman and want the product in their countries if possible." (CX 44B). He also observed that Arman was an "excellent marketing fit, [and] with our OE and oil company contacts it could generate additional business rapidly." (CX 44B).

640. Before any acquisition was completed, Champion began to

discuss construction of another wiper plant. (CX 47B; CX 44B). Mr. Surface concluded that Arman should be expanded quickly:

> We would have to develop plans quickly to protect our investment. This would dictate another plant outside of Italy which would be necessary to handle growth.

(CX 44B). Mr. Brotje agreed. (*See* CX 47B).

641. At the same time, Champion also began to plan its worldwide expansion in the wiper business, including "further expansion into [the] O.E. and replacement markets." (CX 52). Mr. Surface suggested that surveys "concerning demand for our product [wipers], duty rates, governmental controls and regulations" be conducted outside Italy in various other countries "such as Venezuela and Mexico." (CX 52).

642. Champion completed the acquisition of Arman on February 25, 1977. (CX 60A–Z–7; CX 57A–B).

643. Shortly after it acquired Arman, Champion began to search for a site for a second wiper plant in Europe (CX 65C; CX 609B) and was developing a wiper marketing survey. (CX 65C). The second plant's capacity was to more than double Champion's overall wiper capacity. (CX 978M; CX 77A). [81]

644. On August 25, 1977, Champion's executive committee authorized Mr. Surface to enter into negotiations for a new wiper plant to be located in Belgium. (CX 85–86). In September, 1977, Champion planned to construct its second wiper facility, capable of producing 18 million wiper blades per year, in Latour, Belgium. (CX 96A). The plant was to be the most modern in the world. (CX 609C; CX 713H).

645. In August, 1977, Mr. Surface asked George Galster, Champion's vice president and director of international sales, in preparation for turning over wiper sales to the Champion sales organization, to make "a determination of what areas outside of Europe that you believe it would be desirable to start a marketing and/or a manufacturing program." (CX 73A).

646. On August 29, 1977, Mr. Galster wrote to Mr. Stranahan, proposing a meeting of Champion's Toledo and European senior managers to discuss wiper blade marketing and "major marketing trends in U.S.A. with emphasis on resulting marketing decisions." (CX 89D).

647. At a meeting of officials of Champion's European sales department held on September 27, 1977, Mr. Cocchialia announced that Champion sales representatives would carry out surveys in the U.S.A. and Europe of market information of wipers, including market potential consumer buying habits, places of purchase and frequency of blade change. (CX 101B).

648. On October 17, 1977, Champion planned patent searches for wiper blades and arms in Europe, Japan and the U.S.A. (CX 119D).

649. On November 30, 1977, Mr. Galster sent to Messrs. Stranahan and Surface a forecast of sales of wiper blades, under the Champion logo, for 1979 and 1980, in the Middle East, Africa, Latin America, Japan, the Far East and Canada. (CX 131A–B).

650. On September 8, 1977, Walter Hadden, president of Champion's Canadian subsidiary advised Messrs. Surface and Stranahan that he was "quietly assembling information" concerning the Canadian wiper industry:

> It could be useful to corporate management in the development of a world marketing plan or a program for North America only. Possibly Canada would prove a good entry point where valuable [82] experience could be gained with reasonable investment and technology refined before embarking upon the big U.S. market.

(CX 92A).

651. On October 3, 1977, Mr. Hadden presented the study of the wiper replacement market in Canada, urging Messrs. Stranahan and Surface to enter the North American wiper blade market by entering Canada initially and expanding into the U.S.A.:

> Canada is a miniature of the U.S., 1/10 the size. Champion has a strongly entrenched distribution network in each segment of the Canadian market. Initial investment required in Canada would be reasonable, the risks of waste and errors minimized, and much could be learned on this limited scale therefore launching operations in the huge U.S. market.

(CX 111A).

652. On December 7, 1977, Mr. Galster reported to Mr. Surface that the Canada wiper market was an "early target market." (CX 136).

653. On September 14, 1977, Mr. Surface reported to Mr. Stranahan the status of the Arman and Latour plants and said:

> Our major problem is to gain knowledge, first in Europe, and then elsewhere throughout the world. I cannot see any expansion outside of Europe with our present facilities and planned facilities before 1979.

(CX 96B).

654. On December 13, 1977, Mr. Surface reported to Mr. Stranahan about a meeting with the principals of Anco. The purpose of the meeting was to lay the ground work for the acquisition of Anco by Champion. (CX 138A–B).

655. On December 16, 1977, Mr. Stranahan wrote to Mr. Galster postponing the meeting proposed by Mr. Galster of key marketing people in Toledo and Europe for the purpose of establishing market-

ing plans for wiper blades, because: "We are in the process of negotiating another program which may completely change our marketing strategy." (CX 137B). [83]

4. Champion's Capability of Entering U.S. Wiper Market in 1978

656. On January 13, 1977, Mr. Surface wrote to Mr. Stranahan comparing the advantages of acquiring Anco versus "attacking the U.S. market with Arman products." He assumed that a Champion wiper plant would be built in the U.S.A. by 1980 and compared costs and market penetration if that occurred with the position which would result in the acquisition, and he concluded by recommending that Champion "should be willing to pay a premium for Anco." (CX 157A–C).

657. As of 1978, Arman had a maximum annual capacity of about 7 million blades, 3.5 million arms and 7.5 million refills. (CX 529). At the end of 1980, Champion's Arman facility had production capacity of 8 million blades and 3 million arms per year and its Latour facility had capacity of 13 million blades and 2 million arms. (CX 1337S–T). Champion's European wiper operations in 1980 had a total capacity of 21 million blades and 5 million arms.

658. Champion's projected wiper blade sales for Europe in 1980 were 11.4 million units. (CX 868B).

659. Champion had incentive to use excess capacity at Latour. Its labor costs had become a fixed expense and it would incur substantial penalties if it did not achieve a certain level of employment at Latour. (CX 887D; CX 436A, B; CX 919P).

660. In 1980, Anco considered use of the Champion's Arman line "as a possible replacement to the SSJ [import] line in the United States." (CX 877B; CX 839B; CX 875B).

661. The Champion "bow tie" is one of the best known trademarks in the United States and around the world. (CX 977B, F).

662. Champion is the spark plug that most domestic customers ask for by name and has the highest customer acceptance. (CX 334Z–2; CX 980H; CX 2075A). More than 50% of spark plugs are sold to consumer-installers. The overwhelming majority of these DIYs specify a brand, and Champion remains the preferred brand. (CX 980H; CX 981F; CX 1036C; CX 2075A).

663. Shortly after it acquired Arman, Champion began to standardize the packaging for its wipers, using the same red, white and black colors as it used for spark plugs. (CX 641B–C; CX 667A, L). By mid-1978, new packaging and logo had been [84] developed for Arman wipers that included the use of the Champion "bow tie" logo. (CX 551F).

664. In July 1979, Champion investigated whether it could use the

name "Champion" on wiper blades sold in the U.S.A., among other places, and concluded that it could not under the trade mark laws. (RX 126C; Surface CX 3005Z–279).

665. In 1978 Champion sold spark plugs in the U.S. to WDs, mass marketers, oil and rubber tire companies and repackagers. Its WD's resold to jobbers, and both the WD's and jobbers resold to fleet operators, dealers, service stations, and end-users. The oil and rubber companies sold primarily to jobbers and dealers, and the mass marketer accounts resold to end-users. Champion also sold spark plugs to automobile manufacturers for resale as replacement parts and for OE installation. Champion sold spark plugs to almost all the leading WDs that were part of a programmed distribution group. (CX 990C; CX 221C; CX 783F–G, R).

666. After acquiring Anco, Champion's advertising campaign for replacement wipers was directed at the consumer. It featured Laurel & Hardy and included prime time television advertising, and advertising at special events such as the Super Bowl, car races, and prize fights. (Longman 545–46).

667. Champion's basic marketing philosophy is to create consumer demand and provide pull-through selling at every level of distribution to assure the movement of its products to the ultimate user. (CX 856A).

668. Prior to acquiring Anco, Champion had experience in the design of packaging that would effectively promote the sale of replacement automotive parts. (CX 1221M–N; CX 1340P).

669. Prior to the Anco acquisition, Champion had sales aids necessary to sell wipers in the United States. (CX 775E).

670. With more than thirty years of experience in the wiper business, Arman has developed considerable technological expertise. (CX 63B; CX 190A).

671. Arman has numerous patents registered in "all the leading countries in the world" including the United States, Canada, Argentina and Brazil, as well as Russia and Japan. (CX 17B; CX 51A–G).

672. Arman compounds and molds the rubber for its wipers based on a natural rubber formula it developed in-house. Arman also designs its own molds and possesses an accurate rotary [85] cutting machine to produce the edge on its rubber elements. (Surface CX 3005Z–105 - Z–106; CX 387A–C).

673. Champion began construction of Latour in November, 1977, and the facility was inaugurated in May 1979. The Latour plant more than doubled Champion's overall wiper capacity. (CX 979M).

674. After Champion's acquisition of Anco, Anco's technical and engineering officials commented favorably on Latour's expertise and technology. (CX 562A; CX 751A–B; CX 727A).

675. Arman produced high quality wipers prior to Champion's 1978 acquisition of Anco. (CX 63B; CX 240C; Surface CX 3005Z–103 - Z–104, Z–112, Z–118, Z–279).

676. Anco considered making Arman blades for imports in the U.S. in 1979 because Arman was better than Anco's Slim Jim line. (CX 810A).

677. By early 1978, Champion had revised its European blade designs to comply with European Economic Community norms and standards. (CX 208C). Those standards were the same as U.S. standards. (CX 615A–I).

678. Anco has obtained components for the Anco Super Slim Jim line from Latour. (CX 525A–U; CX 635A–C; CX 1198A). Super Slim Jim blades were being manufactured at Latour as well as in the United States until around the end of 1980. (Regan CX 3008Z–147).

679. By 1978, Champion's wipers manufactured at Arman were being used as OE by car makers in Europe: Fiat, Volvo, Chrysler U.K., Ford U.K., Alfa Romeo and Lancia. (Cocchiglia 3993; Marnetto RX 4001Z–2, Z–50 - Z–52; Schwyn CX 3010Z–108; CX 1337Z–621).

680. Champion's Arman operation also supplied private label wipers to Ford for distribution to Ford dealers in Europe. (Cocchiglia CX 3002Z–144 - Z–145; Marnetto RX 4001Z–6; CX 143C).

681. Before it acquired Anco, Champion, through its European wiper operations, produced a line of wipers for most of the popular European and Japanese automobiles and for certain American automobiles, including many automobiles produced by American manufacturers for the European market and some American automobiles popular in the United States. (CX 183A–Z–65; CX 17A; CX 117A–G; CX 218A; CX 208C; CX 217A). [86]

682. In 1964 U.S. factories sold 9,292,275 new motor vehicles. In 1980 they sold 8,067,133 units. U.S. factory unit sales of new motor vehicles declined continuously from 1978 through 1980. (RX 5009; Jacobs 2931–33).

683. The sale of wipers for imported cars has been a growing percentage of total domestic replacement market sales. (CX 633I; CX 856F–I; CX 111P). In 1964, imports of new motor vehicles (cars, trucks and buses) were 5.7% of new motor vehicles sold in the United States; imports of new passenger cars were 6.6% of new passenger cars sold in the United States. In 1978, the percentages were 21.9 and 26.1. In 1980, they were 30.6 and 34.9. (RX 5010A).

684. Around the time of its acquisition, Arman manufactured four basic lines of wipers (CX 256–I, Cocchiglia 4014, 4016–17), with 29 blade designs (CX 256Z–18 - Z–19) and 22 different arm designs. (CX 256Z–27).

685. In 1977 Champion planned to have available by the end of 1978

designs of wipers that would cover "a reasonable potential share of the replacement market throughout the world." (CX 109A).

686. By the end of 1977, Champion, through the use of interchangeable fittings with eight wiper blades, serviced applications formerly requiring 122 different blades (CX 978M) and were able to cover virtually all European manufactured cars. (Cocchiglia 4017).

687. In early 1979 the rubber quality of Champion's European wiper operations was the equivalent of Anco's except ozone resistance. (CX 554C–G; CX 562B–F; Surface CX 3005Z–112, Z–118 - Z–120). Champion undertook further improvement of its rubber formula. (CX 554A–G; CX 562A–K; CX 655).

688. Champion was successful in recompounding Arman's rubber formula to achieve a superior rubber formula. (CX 980I; CX 928B; CX 845).

689. The new rubber compound developed by Champion's European wiper operations was envisioned for use not only at its two European plants but also at Anco in the United States. (CX 858F; CX 928B).

690. Champion's European operations had success in rubber injection molding (Schwyn 4097–98), extrusion of rubber elements and on electroplating of wipers (CX 858D–E, L–M) and research on wiper windlift. (CX 959A–J). [87]

691. By the end of 1978, Champion had an extensive line of wipers which it had developed or inherited as a result of the Arman acquisition. (CX 262A–Z–49; CX 980–I; CX 259E, Z–52 - Z–53).

692. By June 1979 Champion's Latour plant was producing a complete line for import requirements in the U.S. (CX 633C; CX 980–I).

693. In May 1980 Anco advised Volkswagen of America that their request for a wiper would be handled based on a Latour design and, as soon as it was production tooled, it would be available from Latour, Belgium, Arman in Italy and the United States. (CX 872A–B).

694. As of the end of 1980, Champion's Arman facility had production capacity of 8 million blades per year and its Latour facility had capacity of 13 million blades. (CX 1337S–T).

695. Champion's European wiper operations had sales, in 1980, of 5.9 billion blades and 1.3 million refills. (CX 1337Z–4 - Z–5).

696. About 66% of blade capacity (13.8 million blades) for Champion's European wiper operations was not being used at the end of 1980.

697. Before the acquisition, Arman sold wiper products to customers in countries in the Middle East, Africa and Southeast Asia. (CX 129A; Marnetto RX 4001U–W).

698. For several years, starting before 1975,[9] Arman sold wiper

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[9] Arman's export sales manager, Romana Marnetto, testified in a deposition that she knew that Warshanky was a customer of Arman before she came to Arman. She started as a secretary to Arman's owner in 1969 and became export sales manager in 1975. (Marnetto RX 4001E, F, Z–52).

blades to Warshansky Company, a distributor of foreign car parts in Chicago. Mr. Warshansky visited Arman at the Turin automobile show and gave Arman an order for blades to be used as replacement blades on Fiats imported into the United States. Every year or two thereafter he ordered one or two thousand blades. (Marnetto RX 4001T, Z-50, Z-52; CX 129A-B). In 1977, Warshansky's purchase of wiper products from Arman amounted to about $8400. (He purchased .06% of Arman's total sales of $14 million.) (CX 96A; CX 129A). [88]

699. Mr. Arman, the majority owner of Arman before the acquisition, and Mr. Nanni the minority owner and general manager, tried to sell wiper products in the United States and they had traveled to the United States for that purpose at least once. (Marnetto RX 4001Z-50, Z-52).

700. Arman blades have a higher superstructure than a comparable Anco blade so that the wind can pass through it and not lift the blade off the vehicle. That is necessary in Europe where there are no speed limits and high speed operation is more common than in the United States. U.S. cars can be fitted with lower profile blades, which auto manufacturers find aesthetically pleasing. (Harbison 3530-31; RX 1201A and C).

701. The element in the European blade is also smaller and thinner because the wiper system on European automobiles is usually smaller than those sold in the United States. (Harbison 3531-32, 3537-38; Regan CX 3008Z-123 - Z-124, Z-134 - Z-135).

702. In Europe wiper blades generally are not refillable. (Harbison 3530).

703. Wiper design is more art than science at Arman, with very little written down which could be transported elsewhere to assist a new wiper plant. (Schwyn 4151-59).

704. Latour is a standardized, normalized, rigorous, delineated, reproduceable manufacturing plant. The advantage of such a system is that it is easily duplicated and moved to another location. (Schwyn 4116, 4158).

705. Mr. Longman, president of Pylon, perceived Champion as a potential entrant into the U.S. aftermarket after it acquired Arman. (Longman 701).

706. In 1977, Anco's president also perceived Champion as a potential entrant into the U.S. market after the acquisition of Arman. (CX 359C). [89]

Discussion

The following discussion summarizes and supplements the findings of fact and presents conclusions of law:

I. INTRODUCTION

Until 1968, windshield wipers were made and sold in this country only by Anco and Trico. (F. 238). They had about equal sales in the replacement market. (F. 239). Anco strongly adhered to resale price maintenance policies, had no private label product or sales to discount mass merchants, and sold primarily to selected distributors. (CX 1014N; Frank 2603). Trico had most of the OE market. (F. 238).

Wipers for replacement typically were installed on the car by a worker at a gasoline station or garage. The wipers were distributed through WDs and jobbers, and by oil and tire companies. (F. 184, 185).

In the late 1960's and early 1970's, Pylon, Roberk, Tridon and other new companies started to make wipers, attracted by the expiration of blocking patents. They sold directly to chains of department stores and auto parts stores, as well as traditional distributors, appealing to the do-it-yourself consumer with low prices, pushing the use of refills rather than the replacement of the entire wiper blade. (CX 1014J; RX 45; F. 240–42).

Consumers found that they could easily install wipers. (F. 194). The market changed rapidly. Wiper sales by professional installers dropped. (F. 195, 226). Jobbers started selling at retail. (F. 200, 207). Price competition flourished. (F. 263, 271, 272). Nefco, Fram, Ideal and Bosch came into the market, and, after a temporary withdrawal, Tridon wipers were vigorously reintroduced. (F. 167, 151, 137, 108, 161). Anco and Trico joined the fray, competing on price and selling to the mass market. (F. 281, 267–70, 259).

In 1977, Champion Spark Plug Company bought Arman, a major wiper manufacturer in Italy, and Champion started building another wiper plant in Latour, Belgium. (F. 35, 42). Then, in May 1978, Champion acquired Anco. (F. 28). [90]

II. RELEVANT MARKET

The relevant market is the manufacture[10] and sale of windshield wiper blades and refills ("wipers") to the United States aftermarket. (F. 60, 61).

Wiper arms are not part of the relevant product market. Almost all arms are sold as original equipment. (F. 70). Anco and Trico have been the only wiper arm suppliers to the U.S. OE market. (F. 62; CX 1032Z–4). Bosch supplies arms as OE in Europe. (F. 157). Since these firms have supplied arms as OE they have had arms to supply the aftermarket. (F. 62). There is, however, little demand in the replacement market for arms. (Abston 182). Unlike wipers which wear out, arms are almost always replaced only when stolen or damaged in a crash. The sales of arms to the replacement market have been dropping steadily for many years. (F. 71).

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[10] Excluded from the relevant market are resellers such as Atlas (F. 65), Sprague (F. 568), and Purolator (F. 562), and, as a potential reseller, Ford Motor Company (F. 611). *United States v. Black & Decker Mfg. Co.*, 430 F.Supp. 729, 737 (D. Md. 1976).

While blades and refills are generally substitutable for each other, arms are not substitutable for wipers. (F. 45–48). There is no production flexibility between arms and wipers; that is, the same equipment cannot be used to produce either product. (F. 68). Arms and wipers are only the last part of the mechanical system used to clean windshields, with the motor and transmission essential parts of that mechanism and the washer parts also playing a role. (F. 43). Mass merchants who carry wipers do not carry arms (F. 69), and Atlas, the largest organization of gas stations, does not carry arms. (F. 65).

The most appealing argument for a "cluster" approach which would include arms in the relevant market is that both Anco and Trico have long sold arms to WDs.[11] However, both Anco and Trico sell other wiper products like windshield washer parts and supplies to WDs and there is no argument that those products are in the relevant market. (F. 10, 91). Other wiper manufacturers [91] have successfully sold to WDs without supplying arms. (F. 152, 172, 137, 106). Not all WDs carry arms, and those that do are carrying fewer part numbers. (F. 69). Furthermore, most WDs carry wiper motors and linkage, yet no wiper company makes motors and Trico is the only wiper company making linkage. (F. 49, 54–55).

Since the purpose of delineating a line of commerce is to provide an adequate basis for measuring the effects of an acquisition, its contours must conform with competitive reality. *United States v. Black and Decker Mfg. Co.,* 430 F.Supp. 729, 737 (D. Md. 1976). The "meaningful competition" in this product market includes refills and blades, not arms.

Nor does the relevant replacement market include sales of wipers to auto manufacturers for resale to their new car dealer customers. In *Tenneco, Inc.,* 98 F.T.C. 464, 581, *rev'd on other grounds,* 689 F.2d 346 (2d. Cir. 1982), and *SKF Industries, Inc.,* 94 F.T.C. 6, 78 n. 2 (1979), the Commission recognized such original equipment service ("OES") sales of automobile parts as distinct from the replacement market.

OES wipers are sold to car manufacturers by separate wiper company salesmen who do not sell to the replacement market. (F. 82–86). OES wipers are a different quality and are sold at different prices than wipers sold in the replacement market. (F. 78, 81). Only OE wiper manufacturers also sell OES wipers. (F. 73).

New car dealers often use OES wipers in performing warranty work on cars (F. 80), and when they do, the wipers are part of the OE market rather than the replacement market. Since new car dealers usually have garages where they do non-warranty repair work, and also often have used cars, taken as trade-ins, for sale (F. 88), they may use OES wipers for non-warranty replacement.[12] Such wiper sales by dealers would compete with sales by other replacement wiper retailers and installers. In the absence of proof, however, of what percentage of OES wiper sales are for non-warranty replacement and because OES wipers [92] are different from replacement wipers in kind and price and are sold by different salesmen to different customers, they should be excluded from the relevant market.

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[11] Another factor supporting the argument is that Anco itself includes arms with wipers in analyzing the market (e.g., CX 1054B, D).

III. LEGAL ANALYSIS OF THE MERITS

A. *Section 7 of the Clayton Act*[13]

The theory of the Complaint is that if Champion's acquisition of Anco were proscribed, Champion would enter the wiper market and increase competition. The Complaint is based solely on the actual potential competition theory. Respondent urges that the theory should be abandoned.

Section 7 of the Clayton Act prohibits acquisitions whose effect "may be" substantially to lessen competition. The statute "look[s] not merely to the actual present effect of a merger but instead to its effect upon future competition." *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966). Section 7 prohibits the elimination of potential competition as well as of actual competition. *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 580–81 (1967); *United States v. Phillips Petroleum Co.*, 367 F.Supp. 1226 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974). The acquisition of a probable future entrant, even without proof or present competitive effect, may violate Section 7. *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981); *Heublein, Inc.*, 96 F.T.C. 385, 583 (1980).

B. *Actual Potential Competition*

To prove that the acquisition violates Section 7 under the actual potential competition theory requires the following [93] findings: (1) the wiper market was concentrated,[14] (2) Champion had the capacity, interest and economic incentive to enter the market, (3) Champion's entry into the U.S. wiper market was likely to produce deconcentration or other procompetitive effects, and (4) that Champion was one of the few most likely entrants or expanders and that its elimination as a result of the acquisition would be reasonably probable to substantially lessen competition. *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 630, 633 (1974); *BOC Int'l Ltd. v. FTC,* 557 F.2d 24, 29 (2nd Cir. 1977); *Heublein, Inc.,* 96 F.T.C. 385, 584 (1980).

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[12] While there is little evidence in the record that this occurs, Anco internal documents include OES sales in the replacement market. (F. 76).

[13] The Complaint alleges that the acquisition violates Section 5 of the FTC Act, as well as Section 7 of the Clayton Act. Section 5 includes but is not limited to violations of the Clayton Act. *Yamaha Motor Co., Ltd., v. FTC*, 657 F.2d, 971, 981 at n. 14 (8th Cir. 1981); *Beatrice Foods Company*, 67 F.T.C. 473, 724–27 (1965). Here, however, complaint counsel pursued the same theory of violation under both statutes.

[14] Even if the market was concentrated there would be no need for concern for the prospects of long-term deconcentration of a market which is in fact genuinely competitive. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 630 (1974).

1. Concentrated Market—Market Share

The relevant market at the time of the acquisition was concentrated, with the top two companies having a market share of 67% in units produced.[15] (F. 183). This ratio indicates [94] an oligopoly subject to the actual potential entrant doctrine. *Heublein, Inc.,* 96 F.T.C. 385, 585 (1980).

2. Champion's Feasible Entry But For the Acquisition

In 1978, Champion had the interest, incentive and capability of entering the United States replacement wiper market in the near future.[16]

Champion has had a history of expanding its business into new geographical markets by building new plants after initially entering by sales through importation. (F. 615–20). Before the acquisition, Champion had a clear incentive in getting into the windshield wiper business, which its executives felt was compatible with (F. 626–28), growing faster, and more profitable than the spark plug business. (F. 621, 623, 625).

During the late 1960's and early 1970's Champion was interested in acquiring Anco or Trico. (F. 629–31). In the middle 1970's Champion became interested in buying Arman in Italy (F. 632) or Paul Journee in France (F. 637), and had in [95] mind the eventual entry into the U.S. wiper market. (F. 634–35). Settling on Arman, Champion also planned construction of an additional plant in Europe even before the acquisition was completed. (F. 640).

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[15] Since price and quality vary so widely in the wiper business (F. 271, 272, 279), the market shares are based on unit, rather than dollar sales. *Coca-Cola Bottling Co. of New York, Inc.,* 93 F.T.C. 110, 206 n. 10 (1979). And each refill was treated as a unit in determining market shares. Although wiper refills are often sold at retail in a package of two, the use of each refill replaces one blade, and vice versa; blades are also sometimes sold two to a package (Kulavik 3059–60); and consumers normally buy either two blades or two refills at a time regardless of packaging. (Cohn 2411; Campbell 1144).

High two firm shares were used because, in this industry, they are more relevant than four firm shares in predicting competitive behavior. *Heublein, Inc.,* 96 F.T.C. 385, 577 (1980).

The market share findings are not precise because they do not exclude foreign sales by United States manufacturers and do not include sales in this country by many foreign manufacturers. These market share findings do show the broad picture of oligopoly, however. "[P]recision in detail is less important than the accuracy of the broad picture." *United States v. Brown Shoe Co., Inc.,* 370 U.S. 294, 342 n. 69 (1962). *See also United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 364 n. 40 (1963); *A.G. Spalding & Bros., Inc. v. FTC,* 301 F.2d 585, 610–11 and n. 20 (3d Cir. 1962).

[16] The issue for determining potential competition in this case is whether it is "reasonably probable" that, but for the acquisition, Champion would have entered the relevant market. *United States v. Marine Bancorporation,* 418 U.S. 602, 617 (1974); *FTC v. Proctor & Gamble Co.,* 386 U.S. 568, 577 (1967); *United States v. Penn-Olin Chemical Co.,* 378 U.S. 158, 175 (1964); *Yamaha Motor Co., Ltd. v. FTC,* 657 F.2d 971, 977 (8th Cir. 1981); *Ekco Prods. Co. v. FTC,* 347 F.2d 745, 752–53 (7th Cir. 1965); *Tenneco, Inc.,* 98 F.T.C. 464, 626 (Clanton, concurring), *rev'd on other grounds,* 689 F.2d 346 (2d Cir. 1982); *contra, FTC v. Atlantic Richfield Co.,* 549 F.2d 289, 294–95 (4th Cir. 1977).

Champion acquired Arman in February 1977 (F. 642), and by August was negotiating a new wiper plant in Belgium doubling its capacity (F. 643–44). Champion continued to plan entry into other wiper markets, including the U.S. (F. 645–653). Champion's interest in importing into this country wipers made at Latour or by Arman was halted by the acquisition of Anco. (F. 655).

Before the acquisition Champion was capable of importing wipers into the U.S. from its plants in Europe, and, in fact, was already doing so, on a small scale.[17] (F. 698, 699).

One of Champion's three top executives assumed in 1977 that a new plant could be built in the U.S. in three years. (F. 656). After building the Latour plant in Belgium in 18 months (F. 644, 673), Champion could have built a wiper plant in the U.S. even quicker. (F. 704).

Before acquiring Anco, Champion was a potential entrant into the relevant market.

3. Likelihood of Deconcentration and Procompetitive Effects

In 1978 Champion could have entered the U.S. wiper market with blades produced by Arman and at Latour. Champion had a universal short line of blades which covered much of the replacement market (F. 681, 685, 686), had a large unused capacity in Europe (F. 696), and was already selling a small amount of wipers for imported cars in the U.S. to one customer in Chicago and trying to sell more. (F. 698, 699). Champion's European wipers were especially suited for replacing wipers on foreign cars imported into the U.S. (F. 679, 681), which, by 1980, involved 34.9% of all new automobiles sold in the U.S. (F. 683). Furthermore, Champion projected that a plant in the [96] U.S. similar to the Latour plant would produce, for a $12 million capital investment,[18] enough wipers to obtain about a 20% market share in five years. (CX 147A). With Champion's marketing experience in the U.S. replacement market (F. 665), the entry into the U.S. replacement market would, with reasonable probability, have produced further deconcentration and other procompetitive effects. *Yamaha v. FTC*, 657 F. 2d 971, 979 (8th Cir. 1981).[19]

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[17] Bosch has been importing wipers from Belgium into the U.S. market for several years. (F. 161, 183). The Latour plant, also in Belgium, also could have supplied the U.S. market.

[18] Champion could have paid cash for the plant in 1977. (Stranahan CX 3007Z–25; CX 978V).

[19] This finding requires no elaborate factual proof. *Heublein*, 96 F.T.C. 385, 588 n. 43 (1980).

4. Market Performance

a. *Trend to Deconcentration*

The clearest indication that the concentration ratio here is an unreliable indicator of market behavior is that Anco and Trico, which together controlled 100% of the market in 1968, had their market share drop to 76.7% in 1975 and to 59.1% in 1980.[20] Further, in recent years, there have been seven new firms successfully making wipers in the United States as well as foreign wiper manufacturers selling here. During this period Anco's market share declined steadily. In 1975, Anco had a 45.1% market share; in 1980, Anco had 34.3%. (F. 183).

A trend toward deconcentration and a decline in the acquired firm's market share indicate a competitive market despite continuing relatively high concentration. *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); *United States v. First Nat'l State Bancorporation*, 499 F.Supp. 793, 804–05 (D.N.J. 1980); *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 643 (C.D. Calif. 1976). [97]

b. *Ease of Entry*

Entry barriers are low.[21] There are no capital cost impediments to entry into the market. (F. 312–321). Costs of leaving the industry are low. (F. 320). Since the late 1960's, there have been no blocking patents preventing entry. (F. 322). Production equipment is available. (F. 334–349). Suppliers stand ready to provide raw materials and finished parts for the new firm which can choose to enter as a light assembler or a manufacturer of wipers. (F. 323–333). Economies of scale are achieved at a relatively low market share. (F. 415–421). There are no product differentiation or other distributional barriers. (F. 372–414).

c. *New Entrants*

Since 1968, seven firms have successfully entered the wiper replacement market. Complaint counsel argue, however, that the wiper companies who have entered the market in recent years cannot compete effectively with Anco and Trico. They say that mobility barriers to "traditional" distribution through WDs and oil companies prevent the new entrants from expanding their foothold in the market.

High expansion barriers can indeed prevent recent entrants from the further growth they need to be effective competitors.[22] Here, however, such barriers are minimal. [98]

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[20] This contrasts with *Tenneco*, where the ratio remained stable since the late 1960's, 689 F.2d at 353.

[21] As are "mobility" barriers which might dissuade expanders from gaining market share.

[22] In *The Budd Co.*, 86 F.T.C. 518, 577–88 (1975), the Commission discounted the effect of 100 small firms in the markets because they were too small to extend favorable financing terms for large orders of trailers or to maintain branch outlets to service or re-sell large numbers of trade-in trailers. And, in *Beatrice Foods Co.*, Docket No. 9112, initial decision, November 21, 1980, [101 F.T.C. 733 (1983)] although there were no technological barriers to hundreds of dairies processing chilled orange juice, in geographically limited areas, there were a limited supply

(footnote cont'd)

For many years Anco emphasized wiper sales to the traditional market by having a full line (F. 191) and using sales "pull-through" marketing with heavy advertising and a relatively large factory sales force. (F. 386). However, Trico has also been highly successful in this market using a different style of marketing. (F. 372, 392). Other wiper manufacturers have started to penetrate this market without copying Anco's methods. (F. 377–380, 402). New entrants have started selling plastic blades and short, universal lines of wipers. Distributors like these short lines because of their lower prices and inventory costs. (F. 212, 405–413). Both Anco and Trico have moved to follow this innovation. (F. 249–253, 414).

Furthermore, department stores and chains of auto parts stores have increased sales of wipers rapidly in recent years (F. 193, 231, 232), and provide new entrants with a ready channel of distribution to compete effectively. (F. 214, 216). And wipers are now being sold through grocery, hardware and drug stores. (F. 234–36).

d. *Price Competition*

The wiper industry is now fairly competitive. (F. 263). The record is replete with evidence showing, about the time of the acquisition, price competition[23] and other procompetitive [99] effects in the sale of wipers. (F. 238–310). For example in April of 1977, Anco's marketing vice president recommended in an internal memo to its controller that prices should not be increased on refills. He described the condition of the market:

> The market place continues to be an extremely volatile and competitive environment and our position as the leader in the traditional aftermarket or replacement field is being continually challenged by new competitors who are concentrating their efforts through Traditional, Private Label and Volume Retailer types of distribution. Their main thrust is to offer "universal" refills at suggested retail prices which are discounted to the consumer thru additional and questionable extra allowances. However, this is the world of reality! Our market is changing rapidly. Nefco, it is reported, are selling Jobbers at W/D prices and traditional Dealers at Jobber prices. Industry statistics prove that the number of service stations (the back bone of our business for many years) is declining and that the sale of wiper products is shifting to retailing Jobbers and Volume Retailers. Our competitors (Roberk, Pylon, Fram, Pylon [sic], Trico) have con-

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of the raw material, orange juice concentrate (*Beatrice* findings 141–44) [101 F.T.C. at 758], a trend towards concentration (*Beatrice* findings 122, 123, 261) [101 F.T.C. at 756, 777], and the heavy advertising expenditures necessary to obtain consumer acceptance and shelf space on a national level (*Beatrice* initial decision, p. 63) [101 F.T.C. at 740] as well as other barriers to effective competition (*Beatrice* finding 267). [101 F.T.C. at 778]

[23] While price competition might also be deduced from a finding of substantial unused capacity, the evidence in this regard is conflicting and unreliable. (CSC Reply pp. 189–99).

Although some of the evidence on competition involved opinions and anecdotes of customers and competitors, it was credible, especially testimony from competitors antagonistic to Champion's acquisition of Anco, such as Messrs. Longman, Sullivan and Oshei, and corroborated objective evidence on that issue. *Independence Tube Corp., v. Copperweld Corp.*, 691 F.2d 310, 330–31 n. 38 (7th Cir. 1982).

centrated their efforts in these areas through innovations in packaging, displays, discounts and other allowances.

(RX 45).[24] [100]

e. *Profits*

A study of profits on sales for the years 1975–1980 shows that profit trends in the wiper business have been consistent with a competitive industry (F. 311). The low and declining profits of Anco and Trico are indicative of competitive, rather than oligopolistic practices. *United States v. Consolidated Foods Corp.*, 455 F.Supp. 108, 140 (E.D. Pa. 1978).

5. Expanders

Where there are low barriers to expansion, recent entrants with but a small market share may well be effective competitors. In *Fruehauf Trailer Co.*, 67 F.T.C. 878, 930 (1965), the Commission held that one of the acquired firms, which had a 2% market share, was held to be a healthy and strong competitor. In *Stanley Works v. FTC*, 469 F.2d 498, 506–07 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973), the acquired firm, with a 1% market share, was held to be a significant competitor. In *Heublein, Inc.*, 96 F.T.C. 385, 590 (1980), the Commission held that nine firms whose market shares ranged from .24% to 2.9%, were all potential expanders.

Tridon built new plants in 1978 and 1980 (F. 102, 104, 423–28), and now has a good share of the OE market. (F. 433–36). In the replacement market, Tridon sells to WDs and mass merchants and in 1980 took the Sears wiper business from Trico. (F. 440–42). Bosch, with $6 billion in sales in the auto aftermarket, is a leading wiper firm in Europe (RX 79) and is preparing to expand its wiper sales in the United States with lower prices. (F. 156, 466–472). Pylon, Roberk, Ideal,[25] [101] Fram and Nefco all have the capability, interest and incentive to expand. These potential expanders insure that the deconcentration trend in wiper manufacturing will continue.[26] *Heublein, Inc.*, 96 F.T.C. 385, 590 (1980).

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[24] The author of the document recommended that: "It is the unanimous opinion of our field force, supported by Regional and Executive Marketing Management that refills for Anco *and Trico* passenger car wiper blades should be excluded from a price increase at this time." (RX 45) (Emphasis added.) While this could be some evidence of "interdependent or parallel behavior," it may merely be unilateral recognition that the two market leaders tend to match each other's prices. In any event, there was no proof that Anco and Trico had the "capacity effectively to determine price and total output of goods or services" in 1977. *United States v. Marine Bancorporation*, 418 U.S. 602, 630 (1972).

[25] Although Ideal and Roberk are related companies, their management is independent. (Glassman 4904).

[26] The changing market with fewer consumer sales by professional installers like gas stations, and more sales by mass merchants, also will help the new entrants.

6. Potential Entrants

Where many firms are interested in and capable of entering or expanding a market, the elimination of one of them by acquisition will have no significant competitive effect. Their presence will prevent market leaders from colluding to raise prices or diminish product quality. *Heublein, Inc.*, 96 F.T.C. 385, 588–89 (1980); *Tenneco, Inc.*, 98 F.T.C. 604 (1981), *vacated on other grounds*, 689 F.2d 346 (2d Cir. 1982).

Here, with relatively low entry barriers,[27] the following firms have shown the interest and skill necessary to enter, and have been dissuaded only by the lack of profit opportunity:[28] Acushnet Company (F. 489–497); Echlin Manufacturing Company (F. 510–527); IC Industries (F. 528–538); IT&T (F. 539–545); Premier Rubber Company (F. 546–558); Purolator, Inc. (F. 559–567); Stewart-Warner Corporation (F. 572–582); Tenneco, Inc. (F. 583–595); and General Motors Corporation (F. 596–607).[29] [102]

IV. CONCLUSION AND ORDER

In 1978, at the time of the acquisition of Anco, Champion was one of twelve potential entrants into the United States wiper market. In addition, there were six other companies already in the market ready to expand. In this context, the elimination of Champion as a potential entrant was not likely to substantially lessen competition. *Heublein, Inc.*, 96 F.T.C. 385, 591 (1980). Furthermore, although still concentrated, the market is competitive, with low entry barriers and a deconcentration trend. These factors prevent application of the actual potential competition theory. *United States v. Marine Bancorporation*, 418 U.S. 602, 630 (1974).

The complaint must therefore be dismissed.

DISSENTING OPINION OF COMMISSIONER MICHAEL PERTSCHUK

The majority of the Commission today summarily affirms the Initial Decision in this case and dismisses charges against Champion Spark Plug Company. The majority fails to explain the reasons for its decision even though the Bureau Director conceded that the central question urged on appeal by complaint counsel was largely unaddressed by the ALJ in the Initial Decision.

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[27] Despite low entry barriers, potential entrants may be dissuaded by low profits. *FTC v. Great Lakes Chemical Corp.*, 528 F.Supp. 84, 94 (N.D. Ill. 1981).

[28] Less certainty of proof is required to establish a company as an expander or potential entrant that is required to show that Champion was a potential entrant. *Heublein*, 96 F.T.C. 385, 590 (1980).

[29] In 1979, Dana Corporation became a potential entrant (F. 498–509), and Stewart-Warner was no longer a potential entrant. (F. 582). Since Neiman Industries (Paul Journee) acquired Nefco in 1979, at the time of the acquisition Neiman was also a potential entrant. And, since Ideal did not enter the market until 1979, it should be treated as a potential entrant at the time of the acquisition.

In his Initial Decision, the ALJ concluded that there were high levels of concentration within the windshield wiper products industry and that Champion, had it not acquired Anco, would have entered the market *de novo* and significantly deconcentrated the market. Consequently, I do not discuss these issues below. However, the ALJ also found that Champion's acquisition did not violate the law because the market remained "reasonably competitive." The basis for the ALJ's conclusion stemmed primarily from the rapid change in the windshield wiper product market in the last fifteen years and his finding that there were numerous potential expanders and entrants. [2]

Complaint counsel do not dispute that there has been significant change in the market. Fifteen years ago, Anco and Trico, protected by patents, were the sole manufacturers of windshield wiper products which were retailed solely through auto repair shops, oil company service stations, and car dealers. In the late 1960's, when Anco's and Trico's patents expired, Roberk, a small auto parts manufacturer, developed a new universal windshield wiper replacement blade and refill that could easily be installed by consumers on most cars. Marketed directly to consumers through such "mass merchandisers" as K-Mart and Sears, Roberk and other manufacturers quickly achieved substantial market share.

Nevertheless, complaint counsel assert that the market is not competitive. The heart of complaint counsel's argument is that the market is actually divided into two distinct channels, with the more significant "traditional" channel dominated by Anco and Trico and protected from effective competition by entry and mobility barriers. While Roberk and others have been free to enter and *expand* the market by appealing to a new group of consumers, complaint counsel argue that they have been unable to break into the "traditional" channel. As a result, Anco's and Trico's prices have been insulated from effective competition. Complaint counsel argue that Champion was uniquely situated to enter the traditional channel and create effective competition. [3]

I would reverse the ALJ's decision because I find that complaint counsel have shown that such market segmentation exists and that there are significant mobility and entry barriers which have prevented would-be entrants and expanders from challenging the duopolistic structure of the significant "traditional" channel of the market. Given the high levels of concentration in this industry, and the evidence supporting the presumption of poor performance, including the lack of price competition within the traditional channel, complaint counsel have shown that Champion's acquisition of Anco deprived the market of the independent entry of the potential entrant which was in fact most likely to enter and most likely to challenge Anco and Trico.

I. PERSISTENCE OF THE TRADITIONAL CHANNEL

It is clear that members of the industry themselves perceive the existence of a "traditional channel," involving sales to warehouse distributors ("WD"), oil companies, and OES firms, and a "mass market channel" involving sales either directly to retail outlets or indirectly to mass merchant feeders. (ID 138)[1] Further, firms deliberately develop marketing strategies which take into account the different demands of the two segments. Anco, Trico, Ideal, Fram, Bosch, and Nefco all compete primarily in the traditional market, making relatively few sales to mass merchants. (ID 97, 152, 163, 172) Roberk and Pylon compete [4] primarily in the mass merchant market, making relatively few sales to traditional distributors. (ID 119) Indeed, attempts to market the same product to both channels have largely failed. (ID 132–133 (Roberk); CPF 2–67 (Fram); CPF 2–75 (Tridon); ID 280–282 (Anco "Rainy Day")) As a result, it is not surprising that Roberk and Pylon together account for 69.6 percent of the sales of WWP in the mass merchant channel, while Anco and Trico continue to dominate the traditional channel, accounting for 87.1 percent of the sales in that channel. (CPF 5–7)

The "traditional" channel—distribution from the manufacturer, through the WD and jobber to the auto repair shop, oil company service station, auto dealership, or consumer—remains the dominant method of distribution of replacement windshield wipers and blades.[2] The evidence indicates that about 72% of replacement windshield wipers and blades, measured in unit sales, still move through the traditional channel.[3]

Perhaps the most telling evidence indicating that there are two separate channels is the evidence of price independence between the two channels. CX 2511 *in camera* shows that Anco and Trico were able to *raise* prices while Roberk and Pylon were [5] lowering theirs.[4] Thus the evidence shows that prices appear to be determined separately in the two different channels. As complaint counsel's expert economic witness, Dr. Winter, testified:

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[1] Citations are made to Initial Decision Findings (ID); Complaint Counsel's Proposed Findings (CPF); Complaint Exhibit (CX); Respondent' Proposed Findings (RPF); and Complaint Counsel's Reply (C. Rep. to RPF); and Transcript (Tr.).

[2] The distinction between the traditional channel and the mass market channel does not depend on who does the installation, but rather on how the product is distributed through the channel.

[3] (CPF 5–7) The ALJ erred in finding that mass marketers accounted for 45% of the market (ID 233), since that figure was based only on a 1975 projection. (C. Rep. to RPF 408) Complaint counsel's figures, on the other hand, are based on a detailed analysis of actual 1978 sales. (CPF 5–7)

[4] Respondent does not deny that it increased its prices as those of Roberk and Pylon were falling. It argues, however, that CX 2511 *in camera* is misleading. (R. Ans. 17, n.43) However, much of respondent's argument simply goes to the issue that its prices were higher than those of Roberk and Pylon, which, by itself, may be explained by higher costs and higher quality. The only argument which it offers to explain the increasing *spread* between prices is that the price data for Anco includes the sales of lower-priced Rainy Day products up until 1978, when the line was dropped. The implication is that the apparent price increase is due solely to this factor.

(footnote cont'd)

> Price sensitivity is relevant [to the level of competition] when we are trying to assess the degree of connectedness between different segments of the market. If the customers are highly sensitive to price, as opposed to other considerations, then you expect them to move back and forth among sellers in such a way as to impose something like a single price discipline on the market as a whole, whereas if they are less sensitive to price and if they are concerned about other attributes of the product or conditions of purchase, then the market may tolerate substantial price differentials among its segments for extended periods of time. (Winter, Tr. 1779) [6]

Respondent is clearly correct that there is some overlap between the two channels and that there is some limited evidence of competition between the two channels. For example, Anco and Trico may be able to compete in the mass market channel, even though the mass market manufacturer has great difficulty competing in the traditional channel. (CAB 29) But the fact that the precise boundary lines may be blurred does not refute the strong evidence that there are in fact two distinct distribution channels within the overall market. The evidence is persuasive that competition within channels is greater than competition *between* channels.

Notwithstanding the evidence of separate channels, respondent argues that it is not insulated from competition from the new entrants. While not directly denying that it has raised prices while Roberk and Pylon prices have declined, respondent points to its declining market share, its eroding profits, and its inability to raise prices to cover increased costs—all evidence purporting to show that the overall market is reasonably competitive.

It is evident that Anco and Trico have both suffered losses of market share, and that Roberk and Pylon have gained market share. (ID 183) But there is little evidence to support the implication that Roberk and Pylon have captured sales that otherwise would have been made by Anco and Trico. Indeed, the preponderance of the evidence shows that Pylon and Roberk have gained sales primarily by developing part of the market which had largely been ignored by Anco and Trico. While unit sales have [7] increased as a result of the growth of the "mass market,"[5] both Anco and Trico have, on average, been able to main-

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An examination of the record materials, however, clearly rebuts the implication that the inclusion of the Rainy Day sales data could explain the increase in the price spread. After subtracting the "mass merchandisers" dollar and unit sales listed in CX 1337P *in camera* from the gross dollar and unit sales listed in CX 3065 *in camera*, it is clear that excluding Rainy Day products has very little impact on the trend of Anco's average unit prices.

[5] The other new entrants—Fram, Bosch, Ideal, Tridon, and Nefco—have garnered a modest increase in market share (as measured in unit sales) from 6.8% to 11.1% from 1975 through 1980. (ID 183) Some of that increase can be ascribed to increased sales to the mass merchant channel, rather than diverted sales from Anco and Trico in the traditional channel. (ID 106 (Tridon); ID 152 (Fram))

tain at least their 1975 level of unit sales. Given the record evidence showing that Anco and Trico have largely been willing to cede the mass merchant portion of the market to other manufacturers, the loss of market share in the overall market, under the circumstances here, is not a convincing sign of competitiveness.[6]

Respondent also argues that, by pleading a single replacement windshield wiper and blade market, complaint counsel cannot now contend that there are, in effect, submarkets. But complaint counsel argue, correctly, that proving that there is an overall market for replacement windshield wipers and blades is not inconsistent with demonstrating that areas within that market are less susceptible to competition and that the loss of Champion as a potential entrant substantially lessened competition within [8] a segment of the overall market. Furthermore, respondent had ample notice of complaint counsel's theory.[7]

II. MOBILITY BARRIERS AND BARRIERS TO ENTRY

The persistence of the two channels seems to stem largely from different demand characteristics. The mass market channel serves the demand for a lower-priced, universal replacement windshield wiper or blade that can be easily installed by "do-it-yourselfers." (CPF 3–38 to 3–45)

The ultimate consumer is the same in either channel. But in the traditional channel, the WD is in reality the primary customer of the traditional channel manufacturers. As Champion's President and Chairman of the Board observed: [9]

> When you are talking about brand consciousness you have to get it back down to the marketing people, the distributors, the jobbers, the retailer, whoever it is. They are the ones in this case, that you are trying to sell a given brand to. Not the consumers. (Stranahan Dep. CX3007–Z–89)

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[6] Respondent's argument that its profitability has suffered turns primarily on data showing a decline in return on sales ("ROS"). For a variety of reasons, ROS data is of limited use in determining the profitability of an industry, which is more appropriately measured by return on investment ("ROI"). While the evidence on ROI does not permit a conclusion that Anco's profits are supracompetitive, the available evidence is consistent with a practice of a noncompetitive industry. For example, even the ALJ's findings show that Anco's return on sales since 1976, has been *above* 1976 levels, with the exception of 1980, a year of industrywide slump.

[7] Paragraph 19 of the complaint charges that "[B]arriers to entry into *and to effective competition* in the manufacture and sale of windshield wiper products for the United States replacement market are high." (Emphasis added) In response to respondent's interrogatories, complaint counsel, eight months before the trial, explained:

> A new entrant may fail to create effective competition if it continuously operates on a small scale or *is limited to particular channels of the market* so that its presence does not demonstrably affect the structure, conduct, or performance of the market.

Complaint Counsel's Answers to Respondent's First Set of Interrogatories, July 9, 1981, at 25. (Emphasis added) Complaint counsel also indicated in those answers that Pylon and Roberk were confined to "one segment of the market"—"the mass merchant channel." *Id.* at 22.

Whatever question there may have been in respondent's mind about the theory of complaint counsel's case, respondent admits that it was put on notice about the "two channel" theory by complaint counsel's pre-trial brief, filed on January 29, 1982. (Tr. 6532–6533)

The WD's demands differ to some extent from the usual retail consumer. The WD is more concerned with quality, full coverage, and assurances that the product will move through the distribution system. (CPF 3-49 to 3-97)

In turn, these demand differences can result in entry or mobility barriers. Entry barriers can be established when potential entrants are so disadvantaged that the expected rate of return on their entry investment is too low to justify entering, while incumbent firms continue to realize rates of return higher than normal. When the would-be entrant already has a toehold within some segment of the industry, the same disadvantages can be termed "mobility barriers," since they prevent the firm from expanding into other segments of the market.[8] [10]

The preponderance of the evidence indicates that there are no major technological barriers to the production of low quality replacement windshield wipers and blades. The WD's demand for high-quality replacement windshield wipers and blades, however, creates technological mobility or entry barriers.

While the expertise needed to develop and produce high-quality replacement windshield wipers and blades may not involve the significant capital barriers typical of "high-technology" products, the evidence shows that extended testing and product development is indeed necessary to produce a high-quality product. Virtually all of the entrants have experienced significant difficulty in developing wipers and blades of sufficient quality and coverage to be attractive to the traditional channel. (ID 107–108; (Tridon); ID 132–133 (Roberk); ID 142–143 (Ideal); ID 153 (Fram); ID 180–181 (Gates)) Many of those manufacturers blame their quality problems for difficulties in attempting to sell to the traditional channel. *See, e.g.,* CPF 5–58 (Fram); CPF 5–79 (Tridon). While most of the manufacturers ultimately overcame most of those problems, they did so only after substantial investment of resources. [11]

The WD's demand for quality and marketing assistance throughout the distribution chain also lead to distributional barriers into the traditional channel. Incumbents who have demonstrated consistent high quality have a market advantage over newcomers who must demonstrate quality. As a result, brand name associated with high quality is an important factor in the traditional channel,[9] and the lack of a brand name may operate as a barrier. Perhaps more importantly, buyers in the traditional channel do not want to be stuck with unwanted merchandise. As a result, the traditional channel demands that the manufacturer promote the product and work with all levels of distribution to promote the sale of the products, a method known as "pull-through marketing." (CPF 3–88 to 3–97) Again, incumbents who have a proven track record in their ability to move their product through the entire chain have an advantage over new entrants. New entrants must either invest substantial amounts in advertising and product promotion, reduce prices, or offer significant marketing assistance through direct sales forces. These requirements are not insignificant. The two dominant firms, Trico and Anco, spent $2 million and $3 million respectively each year on product promotion. [12]

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[8] *See, e.g.,* Caves and Porter, *From Entry Barriers to Mobility Barriers: Conjectural Decision and Contrived Deference to New Competition,* 91 Q. J. of Econ. 241, 254 (May 1977).

In the FTC's Policy Statement on Horizontal mergers, we also noted:

> Besides mere entry, effective competition might also depend upon a firm's achieving a certain scale of operation. Evidence of substantial expansion by firms already in an industry, especially non-dominant firms, may persuasively indicate that barriers to larger scale are not high. Conversely, evidence of frequent entry, but on a small scale, without significant expansion by fringe firms, may also suggest the existence of barriers to larger scale.

Statement of Federal Trade Commission Concerning Horizontal Mergers at 5. (June 14, 1982)

Finally, the traditional channel's requirements for marketing assistance and for a product line with wide coverage lead to substantial scale economy barriers in distribution. The best means of meeting the demand for pull-through marketing is the use of a direct factory sales force, rather than manufacturer's representatives. (CPF 4–87 to 4–102) Both Anco and Trico have traditionally employed direct sales forces. Direct sales forces, however, require a large sales volume, precluding firms with smaller volumes from using it. While firms not using direct sales forces have been able to penetrate the mass market, none have been able to garner more than a very small share of the traditional channel.

III. HISTORICAL ATTEMPTS TO ENTER THE TRADITIONAL CHANNEL

The evidence that there are significant mobility and entry barriers to the traditional channel is strongly buttressed by the direct evidence of a variety of unsuccessful attempts to enter the traditional channel. Other than Pylon and Roberk, who have largely catered exclusively to the mass market channel, none of the other four existing replacement windshield wipers and blades manufacturers, despite years of effort, have succeeded in gaining more than 3% of the overall market.

The record also contains evidence of at least six other attempts to enter the market—some of which were targeted at the traditional segment—which ended in failure and exit from the market. (ID 182) [13]

The only fair conclusion that can be drawn from the historical record is that entry into the traditional channel has been extraor-

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[9] Alternatively, manufacturers may seek OE supplier status as a means of establishing a quality reputation. While there are no distributional barriers to obtaining such status, there are clearly substantial costs in both obtaining OE status and in developing the technology needed to develop windshield wipers and blades of sufficient quality to meet OE specifications. For example, it took seven years of extensive product development before Tridon produced blades which could pass General Motor's specifications. (CPF 4–215)

dinarily difficult. While some firms have been able to maintain a small share of the traditional segment (Fram,[10] Tridon,[11] Bosch,[12] Nefco,[13] Ideal,[14]), none—with the [14] possible exception of Tridon—appear to be poised to compete directly with Anco and Trico to take additional market share. Despite years of promotion, Fram, Nefco and Bosch have been able to retain only a small and, in some instances, declining market share. While the evidence is necessarily less conclusive with respect to the newer entrants, Tridon and Ideal, Ideal's own limited marketing goals seem to preclude a major competitive challenge to the dominant producers.

IV. CONCLUSION

In assessing potential entrants and expanders, it is necessary to evaluate each firm's interest, incentive and capability to determine whether it is reasonably probable that the firm will enter the market and cause significant [15] deconcentration or other procompetitive effects. *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 978 (8th Cir. 1981); *Heublein, Inc.*, 96 F.T.C. 385, 584 (1980).

Given the technological and distributional barriers to entry into the traditional channel, none of the present WWP manufacturers can reasonably be considered to have the incentive or capability to expand into the traditional channel.[15]

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[10] Despite ten years of promotion, Fram has never been able to become more than a fringe manufacturer. Its initial attempts in 1972 to sell to the traditional market were supplemented in 1978 by efforts to sell to mass marketers in an attempt to increase moribund sales. But Fram has largely been unsuccessful in either channel, due primarily to continuous product quality problems.

[11] Tridon, a Canadian manufacturer of automotive products, including replacement windshield wipers and blades, attempted entry into the traditional channel in a joint venture with Gates Rubber Company in 1971. (ID 107) After experiencing major quality problems, Tridon withdrew from the field. After further extensive product improvement and development, Tridon sought to obtain OE approval beginning in 1977. (ID 108) After obtaining OE business of Ford, and some OE business of other manufacturers, Tridon began efforts to reenter the replacement market. By 1980 Tridon's sales were heading up, largely as a result of landing several large mass merchant accounts, including Sears (ID 183, 270, 441–442), but Tridon was continuing to lose money on its replacement windshield wipers and blades. (CPF 5–144, 5–147) While Tridon's management projected continuing increases in sales (ID 447), by the end of 1980 Tridon had still failed to capture any significant WD business.

[12] Robert Bosch GmbH is a German manufacturer and supplier of automotive parts throughout the world. (ID 156) In Europe, Bosch is an OE supplier for major European car manufacturers. Bosch's wiper line for the U.S. replacement market is largely limited to covering European imports for which Bosch was the OE supplier. (ID 162) Bosch has aimed its sales efforts primarily at OES services and WDs serving the import market. All the evidence shows that Bosch has aimed its efforts at selling wiper replacement for imports, which account for a relatively small percentage of total unit sales of replacement wipers and blades. While the record shows that Bosch has plans to increase coverage (ID 470), those plans primarily address increasing coverage of Japanese, as well as European, imports. (ID 471; CPF 5–21) Indeed, in 1977 Bosch decided not to expand into the U.S. domestic market, in part because it recognized that it lacked the means to distribute the product through the traditional channel and would only be able to garner a negligible market share. (CPF 5–17) By 1980, Bosch had only a 1.2 percent share of the overall market. (ID 183)

[13] Despite promotions of its replacement windshield wipers and blades to the traditional channel since 1973, Nefco has remained a manufacturer of minor significance, capturing only 3 percent of market share (in unit sales) in 1980. (ID 183) Nefco has lost money in every year but one. (CPF 5–73) While Nefco has had problems in producing a line with sufficiently broad coverage, its primary difficulty, in the eyes of Anco, lies in its lack of marketing assistance. (CPF 5–70)

[14] Recognizing the traditional channel's demand for higher quality, Roberk's parent company, Parker-Hannifin, attempted in 1979 to enter the traditional channel through a separate subsidiary, Ideal. (CPF 5–45) Even here, however, Ideal envisioned placing itself only as a "second line" to be carried by jobbers along with a "primary" Anco or Trico line, not a line that would replace an Anco or Trico account. (CPF 5–46) Even with these limited goals and a commitment to produce a high quality product, Ideal by the end of 1980 had secured less than 2% of the overall market. (ID 183)

The ALJ found that there were twelve potential entrants, including Champion. The ALJ's principal error here is in his apparent conclusion that firms can be considered potential entrants if they manufacture or distribute some automotive product and have sufficiently large financial resources to purchase the requisite technology to enter the *overall* market. When each of the firms are examined on the attributes required to become a significant competitor in the *traditional* channel, however, it becomes clear that only Champion possesses the relevant capabilities, interest, and incentives. (CAB 72 to 78) [16]

Given the conclusion that the market is not, as the ALJ found, reasonably competitive, and the further finding that there are few, if any, other expanders or potential entrants as well suited as Champion to cause significant deconcentration, I conclude that Champion's acquisition of Anco effectively deprived the market of the benefit of Champion's *de novo* entry. Accordingly, I would find that Champion's acquisition of Anco violated Section 7 of the Clayton Act by substantially lessening competition in the replacement windshield wipers and blades market, and that divestiture should be ordered.

Final Order

This matter having been heard by the Commission upon the appeal of respondents and complaint counsel from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record;[1] and

The Commission having denied in full the appeals of respondent and complaint counsel; and

The Commission having determined that the initial decision and order contained therein shall become the decision and order of the Commission.

Therefore, it is ordered, That the initial decision and the order contained therein shall become the decision and the order of the Commission on the date of issuance of this order.

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[15] The only possible candidate in this group would be Tridon, who possesses a product with OE approval status, wide application, and efficient production capabilities. (ID 422–477) Nevertheless, Tridon's prior attempts to enter may have given its product a reputation of low quality, it still lacks the sales force necessary for pull-through marketing and it has failed to promote the product aggressively. (ID 107, 112, 440; CPF 5–146) While these negative features may well explain Tridon's failure to obtain significant WD business, the record does not permit as strong a conclusion about its lack of future potential as the other present manufacturers. Even if Tridon were a potential expander, however, that fact would not bar a finding that Champion's acquisition of Anco violated Section 7, since we need find only that the acquisition eliminated one of a "limited number" of other firms reasonably likely to enter or expand in the relevant market. *Heublein, supra,* at 588.

[1] By this action the Commission also denies Respondent's Motion to Strike four tables and references thereto from Complaint Counsel's Reply Brief.

Commissioner Pertschuk voted in the negative.

IN THE MATTER OF

GENERAL MOTORS CORPORATION

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SECTION 2(d) OF THE CLAYTON ACT AND SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9114. Complaint, July 19. 1978—Final Order, June 21, 1984

This order dismisses the Commission's complaint charging a Detroit, Mich. motor vehicle manufacturer with allegedly violating the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act by failing to make promotional allowances available on proportionally equal terms to all competing rental and leasing firms. In its opinion, the Commission noted that "in light of the Commission's public interest mandate" the Commission and the courts must be careful "not to expand the ambit of legislation beyond that set forth by Congress" and the Commission will therefore "eschew efforts to broaden application of the Robinson-Patman Act beyond that established by law."

Appearances

For the Commission: *Renee S. Henning.*

For the respondent: *Frederick Rowe, Kirkland & Ellis,* Washington, D.C.,

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, General Motors Corporation [hereinafter referred to as GM], has violated and is now violating the provisions of Section 2(d) of the Clayton Act, as amended (15 U.S.C. 13), and of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. GM is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at 3044 West Grand Boulevard, Detroit, Michigan.

PAR. 2. GM is the largest manufacturer of automobiles in the United States. In 1977, GM sold approximately 6.6 million automobiles, trucks and coaches in the United States. During 1977, GM's net sales exceeded $54,961,000,000. GM's net income during 1977 exceeded $3,337,000,000.

PAR. 3. In the course and conduct of its business, GM has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and GM's methods of competition are and have been in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended. [2]

The acts and practices herein described in connection with GM's offers and grants of advertising allowances and other expenses [hereinafter collectively referred to as agreements] are and have been in commerce, as "commerce" is defined in the Clayton Act, as amended, and are now and have been in or affecting commerce as the term "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. GM sells its automobiles and trucks [hereinafter referred to as vehicles] to dealers which, in turn, sell the vehicles to rental and leasing companies [hereinafter referred to as GM customers]. As more particularly described herein, GM deals directly with GM customers in administering its agreements in connection with the sale of its vehicles.

PAR. 5. In the course and conduct of its business, GM has paid or contracted for the payment of something of value to or for the benefit of some of its GM customers, as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such GM customers in connection with the distribution of vehicles sold by GM. GM has not made or offered to make such payments for services or facilities available on proportionally equal terms to all of its other GM customers competing with such favored GM customers.

For instance, GM has engaged in agreements with certain GM customers, including but not limited to, National Car Rental System, Inc., whereby payments have been made for advertisements linking vehicles sold by GM with the vehicles offered for rent or lease by GM customers to the value and benefit of said customers. Typical are advertisements placed by National Car Rental System, Inc., which include phrases such as: "We feature General Motor Cars." Payments for these agreements have been made by GM to GM's customers, or their agents. GM has not offered to pay, has not paid or otherwise made payments available on proportionally equal terms to all of its GM customers competing with the favored GM customers. [3]

COUNT I

Alleging violation of Section 2(d) of the Clayton Act, as amended.

PAR. 6. The allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. The acts and practices of respondent, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13).

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 8. The allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 9. The aforesaid acts and practices of respondent GM violate the policy of Section 2(d) of the Clayton Act, as amended; all to the prejudice of the public; have the tendency and effect of preventing and hindering competition and may tend to create a monopoly in the vehicle rental or leasing businesses; and constitute unfair methods of competition in commerce and unfair acts or practices in or affecting commerce, within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 29, 1983

PRELIMINARY STATEMENT

By Complaint issued on July 19, 1978, respondent General Motors ("GM") is charged with violation of Section 2(d) of the Robinson-Patman amendment to the Clayton Act, 15 U.S.C. 13(d), and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

The Complaint alleges that GM sells automobiles and trucks to dealers which, in turn, sell the vehicles to rental and leasing companies, and that GM deals directly with rental and leasing companies in administering its advertising agreements in connection with the sale of its vehicles. (Complaint, ¶ 4)

The Complaint also alleges that GM has paid some rental and leasing companies for advertising furnished by such companies in connection with the distribution of vehicles sold by GM, and that GM has not made such payments available on proportionally equal terms to all other competing rental and leasing companies. (*Id.*, ¶ 5) As an example, the Complaint alleges that GM has entered into advertising agreements with National Car Rental System, Inc., whereby GM pays for advertisements placed by that firm which include phrases such as: "We Feature General Motors cars." (*Id.*)

In Count I, the Complaint alleges that GM's acts and practices violate Section 2(d) of the Clayton Act. In Count II, the Complaint alleges that the same acts and practices violate Section 5 of the FTC

Act, in that they allegedly (a) violate the policy of Section 2(d) of the Clayton Act, to the prejudice of the public; (b) have the tendency and effect of preventing and hindering competition and may tend to create a monopoly in the vehicle rental or leasing businesses; and (c) constitute unfair methods of competition in commerce and unfair acts or practices in or affecting commerce. (*Id.*, Count II)

In its Answer filed on August 17, 1978, GM generally denies the various allegations of the Complaint. The Answer affirmatively alleges that: (a) to support the retail sales efforts of GM dealers in offering GM vehicles to the new car consuming public, GM purchases advertising from many sources and media, occasionally including rental and leasing companies or systems which promote and feature GM products in their advertising, (b) GM does not purchase, nor is it obligated to purchase, advertising from all media or other potential suppliers of advertising, (c) rental and leasing firms are engaged in the business of offering a service to their customers which includes the opportunity for potential new car customers to "test drive" GM products, (d) there is no connection between GM's purchases of advertising and the rental and leasing [2] companies' purchase of GM or other vehicles from independent franchised GM dealers, and (e) GM's purchases of advertising are a lawful, procompetitive activity. (Answer, ¶ 5)

The Answer affirmatively alleges that GM's purchases of advertising have benefited competition within the automobile industry and within the rental and leasing industry and have benefited consumers of both new cars sold by dealers and of services offered by rental and leasing companies. (*Id.*, ¶ 9) The Answer also affirmatively alleges that the Complaint fails to state a claim upon which relief can be granted because, *inter alia*, (a) rental and leasing companies are not customers of General Motors, (b) the advertising purchased by General Motors is not purchased in connection with the sale or resale of any product or commodity, and (c) rental and leasing companies do not resell any products or commodities, but rather provide a service to their customers. (*Id.*, ¶ 10)[1]

On April 28, 1980, the parties signed a consent agreement proposing to settle the proceedings. By order dated May 23, 1980, the consent agreement was certified to the Commission, which in turn withdrew the matter from adjudication pending its consideration of the proposed settlement. The consent agreement was ultimately not approved, and by Commission order dated March 12, 1982, the matter was returned to adjudication. By order dated March 17, 1982, the proceeding was assigned to me for hearing because of my predecessor's retirement.

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[1] The Answer asserts additional two affirmative defenses: discriminatory enforcement and violation of the terms of a protective order entered in *In re Hertz Corp.*, Docket No. 9033. (Answer ¶ 11) GM elected to waive its protective order violation defense at hearing. (tr. 1519–21) The other affirmative defense will be dismissed as a matter of law. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Indus. v. FTC*, 355 U.S. 411, 413 (1958).

On April 21, 1982, I adopted a stipulation by which, complaint counsel abandoned any claim that GM's acts and practices in issue caused any injury to competition. In the Stipulation, complaint counsel agreed that "they will not pursue the third of their general theories of violation of Section 5, *i.e.*, the Section 5 injury theory." (Stip., ¶ 7) Specifically, the abandoned theory was that the GM acts and practices covered by the Complaint allegedly "constitute a violation of Section 5 because of their effect on competition." (Stip., ¶ 1(c)) Based on complaint counsel's decision to drop their Section 5 injury theory, the parties agreed that "[n]either the effects on competition nor the lack of effects on competition of the GM acts and practices covered by the [3] complaint are in issue in this case" and that "[e]vidence regarding the competitive effects, as well as evidence regarding the lack of competitive effects, of these GM acts and practices is irrelevant and inadmissible and, therefore, will not be offered in this case by complaint counsel or GM." (*Id.*, ¶¶ 5, 6)

With the adoption of the Stipulation, complaint counsel's theories of violation of Section 5 of the FTC Act are as follows:

(a) That the GM acts and practices covered by the complaint violate Section 5 of the Federal Trade Commission Act because they constitute a violation of Section 2(d) of the Clayton Act.

(b) That these GM acts and practices also violate the spirit of Section 2(d) and, thereby, violate Section 5. Under this theory, Section 5 would fill gaps, if any, in the proof of the Section 2(d) violation. (Stip., ¶ 1)

On September 14, 1982, less than three weeks before the trial was scheduled to commence, complaint counsel filed a motion for summary decision. By order dated October 4, 1982, complaint counsel's motion was denied as tardy. As required by Rule 3.24(a)(5) of the Commission's Rules of Practice, an order specifying facts that appear without substantial controversy was entered on October 8, 1982.

Trial commenced on October 5, 1982 in Washington, D.C. and concluded there on November 15, 1982. Complaint counsel called 13 witnesses; GM called three. Additional testimony was received from four other Commission witnesses by deposition, affidavit and interrogatories. The record includes 3,177 transcript pages and 485 exhibits, many multi-paged. On April 18, 1983, the parties filed proposed findings and post-hearing briefs. On June 24, 1983, the parties filed reply findings and briefs.

The parties were directed to prepare document lists in accordance with the Commission's guidelines in *General Motors Corp.*, 99 F.T.C.

464, 555 n. 1 (1982). The parties complied and those lists were admitted as exhibits CX 1A–Z–30, CX 2A–R, and RX 144A–O, and the record was closed on August 15, 1983.

Any motions not specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of facts made herein are based on a review of the entire record and upon consideration of the demeanor of the witnesses who gave testimony in the proceeding. [4]

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.

Abbreviations

The following abbreviations are used in references to the record of this proceeding:

tr. – Transcript page and line number, sometimes preceded by witness' name
CX – Complaint counsel's exhibit, followed by its number and in some cases pages
RX – Respondent's exhibit, followed by its number and in some cases pages
f. – Finding, followed by its number
ff. – Findings
RAD-Supp – Respondent's response to request for admissions, dated August 23, 1982, followed by a reference to a numbered paragraph.
GM – General Motors Corporation
GMAC – General Motors Acceptance Corporation
car – automobile and/or truck
Avis – Avis Rent-A-Car System, Inc.
Budget – Budget Rent-A-Car Corporation
Hertz – Hertz Corporation
National – National Car Rental System, Inc.

Definitions

a. *Fleet* is a new car customer registering at least ten new vehicles annually, and includes commercial companies, political subdivisions, and rental and leasing firms. (Vader tr. 3018, Vader CX 7780Z–10; McClintock tr. 1138, 1242) [5]

b. *Leasing transaction* is the lease of a car to a customer for a period of six months or longer, normally ranging from twenty-one to thirty-six months for automobiles to over five years for trucks. (CX 7777–11, Z–38; Oshry tr. 1903–14; CX 7743D)

c. *Rental transaction* is the rental of a car to a customer for a period ranging from one day to six months. (CX 7777Z–11, Z–38; Nevel tr. 1032–33; CX 7743D)

d. *Favored* rental and leasing firms use GM cars and receive more advertising payments per car from GM pursuant to an advertising agreement than their competitors.

e. *Disfavored* rental and leasing firms use GM cars but receive either no advertising payments from GM or less than their competitors pursuant to an advertising agreement. [6]

I. FINDINGS OF FACT

A. *General Motors*

1. General Motors ("GM") is a Delaware corporation, with its principal office and place of business located at 3044 West Grand Boulevard, Detroit, Michigan. (Complaint, ¶ 1; Answer, ¶ 1)

2. GM is the largest manufacturer of cars in the United States. During 1977, GM sold 6.7 million cars and trucks in the United States, and had net sales of $54.9 billion and net income of $3.3 billion. (Complaint, ¶ 2, Answer, ¶ 2)

3. GM sells its new cars and trucks to franchised dealers who sell them to consumers, including rental and leasing firms. (Complaint, ¶ 4, Answer, ¶ 4)

4. GM is engaged in interstate commerce and is acting in the course of such commerce. (Order Specifying Facts, dated October 8, 1982)

B. *GM and Franchised Dealers*

5. GM has franchise contracts with new car retail dealers. These franchise contracts are called sales and service agreements. (McClintock tr. 1209)

6. In 1983, GM has franchise sales and service agreements with about 12,000 dealers. (McClintock tr. 1199)

7. GM has five car divisions: Chevrolet, Buick, Oldsmobile, Pontiac and Cadillac. (CX 7741B; CX 7758C) Some dealers have franchise agreements with a single GM division. Others have franchise agreements with two or more divisions. (McClintock tr. 1201–03, 1206–07, Quick tr. 1455)

8. The sales and service agreement permits a dealer to purchase and resell to consumers the products of a GM division at a particular location, and to use that division's mark. (McClintock tr. 1210) In return, the agreement requires the dealer to sell new cars manufac-

tured by the division, to carry and sell replacement parts for those cars, and to operate a service department for repair and maintenance of those cars. (McClintock tr. 1213, 1216–17; Quick tr. 1405–06, 1457)

9. GM franchised dealers are independent businessmen. (Quick tr. 1462; McClintock tr. 1213, 1221; Uliano tr. 2450) They are not owned or controlled by GM. (Quick tr. 1408) [7]

10. Other lines of business in which a franchised dealer may become involved commonly include the rental and leasing of cars, as well as sales of competing makes of new cars (*e.g.*, Datsun or Saab), operation of a used car lot, operation of a body shop for the repair of wreck damage, financing or insurance. (McClintock tr. 1213–16; Quick tr. 1406–07, 1409).

11. Franchised dealers may participate in car rental and leasing businesses through common ownership, a separate subsidiary, or a department or division of the dealership. (*E.g.*, McDougal CX 3244Z–16 - separately incorporated rental and leasing operations; Avery CX 2219A–C, RX 1E - one-third ownership interest in a rental business run as a division of the dealership as well as a leasing business owned by the dealership and run as a division; Quick tr. 1370–73, 1406–07 - rental and leasing division or department)

12. Most franchised dealers who operate a car rental business restrict their operation to "shop or service rentals," providing substitute transportation to a person whose own car is being repaired in the dealership's service department. (Vader tr. 3015–16; Vader CX 7780Z–11; Avery RX 1C)

13. In 1979, of 10,369 GM dealers, there were 6,912 leasing cars. There were 4,957 GM dealers who ran their leasing operation as a department of the dealership rather than as a separate business entity. (CX 7778M, F)

14. In 1979, there were 4,995 GM dealers renting cars. There were 4,194 dealers who ran their rental operation as a department of the dealership. There were 3,081 GM dealers engaged in shop rentals only, 267 in public rentals only and 1,647 in both shop and public rentals. There were 578 GM dealers who were members of a daily rental system such as National, Avis, Hertz or Budget. (CX 7778F)

C. *Distribution of GM Cars*

1. Orders for Cars

15. GM franchised dealers submit orders to GM for new GM cars on an ongoing basis. (McClintock tr. 1221–22) New GM cars are only built to a dealer's order, with the exception of cars that GM uses itself or sells to the federal government or the Red Cross. (Brazill tr. 2763)

16. Dealer orders for new GM cars are either "stock orders" or "sold

orders." A stock order is one where the dealer is purchasing the car for his new car inventory for subsequent retail sale. A sold order is one where the dealer is buying the car for resale to a consumer with whom he has negotiated a contract of sale. (McClintock tr. 1221-22) [8]

17. Upon receipt of a dealer order, GM forwards it to the assembly plant for production. (McClintock tr. 1222) Once built, a new GM car is shipped to the ordering dealer's premises or to a location he designates. (McClintock tr. 1226)

18. At the time of shipment, GM receives payment from the dealer for the new car, and ownership and title to the car is transferred from GM to the dealer, either by certificate of origin or bill of sale. (McClintock tr. 1227-31)

2. Prices of New Cars

19. The "dealer invoice price" is the amount a franchised dealer pays GM for the new car upon shipment. (McClintock tr. 1253; Ashbaugh tr. 999-1000; Brazill tr. 2725) The dealer invoice price is the same for all dealers for the same make, model and equipment at any given time. (McClintock tr. 1254; Brazill tr. 2732; Uliano tr. 2463)

20. Included in the dealer invoice price is a small amount (from 1% to 3%), called a "holdback," that is later paid to the dealer on a periodic basis that he selects. This amount is "held back" and credited to the dealer's account with GM so as to provide the dealer with a contingency reserve fund in the event of an unexpected financial emergency. (Brazill tr. 2725-26; Ashbaugh tr. 999-1000)

21. Federal law, 15 U.S.C. 1231-1233, requires all automobile manufacturers to post a manufacturer's suggested retail price ("MSRP") on the window of a new car. (McClintock tr. 1254; CX 7751W, Vader CX 7780Z-17-18) The dealer and the consumer frequently agree on a price different from the MSRP. (McClintock tr. 1254-55)

22. On occasion, GM offers "price protection," agreeing that the price of a car to the dealer will not be increased between the time the dealer enters into the contract of sale with his customer and the time the car is delivered to the dealer. (Vader tr. 3047; Vader CX 7780Z-114-15; Ashbaugh tr. 991)

23. State law in some jurisdictions requires that automobile manufacturers offer price protection to their franchised dealers. (*E.g.,* Cal. Veh. Code Section 11713.3(h) (West 1982); Mich. Stat. Ann. Section 19.856(34)(d) (Callaghan 1982); Minn. Stat. Ann. Section 80E.13(d) (West 1983))

24. On occasion, GM also offers "price assurance," agreeing that, as to a new model car, the price to the dealer will not exceed the price

for the prior year's model plus a certain percentage. (Vader tr. 3048-51) [9]

25. The price and other terms at which a consumer purchases a new GM car from a franchised dealer are negotiated between the consumer and the selling franchised dealer. (McClintock tr. 1221; Quick tr. 1410-11; CX 7735F)

3. Delivery of Cars

26. Upon its arrival from the factory at the dealership or other dealer-designated location, a new GM car is inspected and conditioned by the dealer or his authorized representative. Thereafter, delivery of the car is made to the consumer. (McClintock tr. 1261-62; Brazill tr. 2711)

27. GM usually delivers new cars ordered by its franchised dealers to their dealership premises. (McClintock tr. 1226; Brazill tr. 2724-25; Uliano tr. 2455) However, at a franchised dealer's request, a new car may be delivered to another location designated by the dealer pursuant to GM's drop shipment policy. (McClintock tr. 1226, 1260-67)

28. GM franchised dealers may request drop shipment of new cars from GM where the dealer has agreed to deliver the cars directly to the fleet user. Either the selling dealer or another franchised dealer receives the cars and completes the inspection and conditioning at the fleet user's location. (CX 7774A-B, G, I)

D. *Dealers Rent and Lease Cars*

1. GM Encouragement

29. The GM Dealer Sales and Service Agreement has a standard agreement for all five GM car divisions providing that it is the responsibility of the dealer to:

> Fulfill the transportation needs of customers on an active, effective and competitive basis, by Dealer's direct sales of new Motor Vehicles and the rental and leasing of Motor Vehicles through rental and leasing operations conducted by Dealer pursuant to the provisions of . . . this Section. . . .

(CX 7781Q, E; McClintock tr. 1209; *see also* CX 7777Z-19, CX 7781S-T)

30. In 1975, there were more than 300 GM dealers that were National licensees. (CX 4062-I; Uliano, tr. 2366-67; CX 4037A, F-G, Q; CX 4035D) [10]

31. Some Avis licensees are GM dealers. (CX 2065-I - Brad Smith Chevrolet serving Crested Butte, Gunnison, Montrose, and Telluride, Colorado, tr. 826-27; CX 7778M)

32. In 1972, sixty-three Budget licensees were GM dealers. (CX 2211T; CX 2220Z-97 - Belzberg)

33. Some Dollar Rent-A-Car outlets are GM dealers. (CX 2715, pp. 3-4, 14, 1)

2. Genway Corporation

34. The Dealer Division of Genway Corporation ("Genway") provides financial and insurance services to GM dealers. It has about 500 GM dealers licensed, with at least one dealer in every state and about half of them in the northeast quadrant of the country. (CX 3244N, P)

35. Genway buys cars from a GM dealer and leases the cars back to the same dealer, who then rents or leases the cars to the public. (CX 3244T)

36. As of June 30, 1982, there were 13,540 vehicles leased under the Genway logo. (CX 3244V)

37. Genway provides GM dealers with financing for the cars, insurance, financial management and control information, and with experienced field personnel to help the dealer in the rental and leasing business. (CX 3244S)

38. GM dealers pay $1250 for a Genway lease and rental license. (CX 3244W)

39. Genway finances the purchase of vehicles from GM dealers with money borrowed from GMAC. (CX 3244Z-43)

40. The GM dealers in the Genway network purchase cars directly from GM. (CX 3244Z, Z-41; McClintock tr. 1153-54, 1211-12) For financing purposes, the Genway GM dealers later transfer title to some of the cars already being used in their rental and lease fleets to Genway. They lease these cars back immediately for their rental and lease fleets, without ever giving Genway physical possession of the cars. Typically, by the time Genway purchases the car for immediate leaseback, the car has already been leased out by the dealer to a customer and is in the customer's hands. (CX 3244Z-40-43, Z-32 - McDougal; CX 3238K)

41. Genway and its Chevway Division had advertising agreements with GM during the period 1973 to 1980. Under these agreements, GM reimbursed, among other things, 50% of the cost [11] of local yellow page telephone directory listings appearing under the name "CHEVWAY" and including the names of local Chevrolet dealers. (CX 3243A)

E. *GM's Connection with Fleet Sales*

1. Prices

42. GM provides its dealers with price lists showing the dealer invoice price, the MSRP, and the price of optional equipment. (McClintock tr. 1257-58)

43. Rental and leasing firms sometimes receive these current price sheets for GM cars from a GM division. (Ashbaugh tr. 869–70; Uliano tr. 2407–08)

44. GM representatives sometimes discuss with rental and leasing firms prices at which they can get cars from GM dealers. (Uliano tr. 2407–08; Kieffer 2265–69)

45. GM representatives sometimes suggest to a rental and leasing firm a dealer to buy cars from. (Kieffer 2265–69)

46. A GM factory representative has advised Trans Rent-A-Car of potential price increases. (Furman tr. 1613–14)

47. GM fleet representatives tell rental and leasing firms when GM is offering free air-conditioners to its dealers that will reduce the price. (Korn tr. 2120–21; Kieffer tr. 2261–62)

48. In 1982, GM mailed fleet buyers an itemized list of the MSRP of various options, such as tilt steering wheels and tinted windows. GM wrote these fleet buyers that their "savings" per car under the program would be $200. (CX 5227Y; CX 7510–I ("$400 savings"))

49. In 1981, GM notified Colonial Car Lease Inc., that guaranteed interest rate financing will be offered for fleet orders on certain GM models, if the orders are received prior to that model's announcement date. (CX 7510C)

50. GM provides cash bonuses to fleets for fleet orders received by a certain date. GM writes rental and leasing firms directly to notify them of this fleet order program and tells them to contact its GM fleet account personnel if they have any questions. (CX 4109F; CX 7510B)

51. When GM offers a price assurance program for all orders received prior to official announcement of the prices on the new cars, GM notifies rental and leasing firms by letter. For example, in 1982, GM promised Colonial Car Lease in a letter that 1983 prices of certain GM models would be no higher than [12] they were on June 14, 1982, for orders received prior to the official price announcement date, and no higher than June 14 prices plus 2% on other models. (CX 7510–I)

2. Advertising

52. GM advertises its cars in national publications such as *Newsweek* and *People* using MSRP. (CX 7766D–F; CX 7751Z–6)

53. GM sometimes advertises price comparisons based on dealer invoice prices. In a 1982 GM *Business Week* advertisement aimed at fleets, GM stated that "with Chevrolet Celebrity based on dealer invoice costs of higher priced nameplate versions of similar fleet-equipped front-wheel-drive cars, the price is up to $504 less." The advertisement asks: "Why should Celebrity be on your selector list? Multiply $500 times your number of fleet cars." (CX 7766C)

54. *Automotive Fleet* magazine is aimed at rental and leasing firms

and other fleet operators. (McClintock tr. 1241–42; CX 7734A, Q, Z53–54) GM advertises its prices in *Automotive Fleet.* (CX 7734K–L) ("Consider the advantages of a low-cost, low scheduled maintenance fleet car: Chevette . . . . Chevy Chevette 4–door is the lowest priced 4–door hatch-back in America!") (CX 7734L)

55. GM advertises its cash bonuses to consumers publicly through advertisements in *The Wall Street Journal, Time, Business Week,* and other publications. (CX 7728E–F, CX 7766A–B)

3. Sales Contacts

56. GM's new model year begins in September or later. (CX 4109B, E; CX 7510C, I; Brazill tr. 2666–67) During the summer preceding the model year, GM contacts fleets directly, encouraging them to place their orders. (CX 2220Z84 - Belzberg; CX 5701; CX 4109)

57. In April or May, GM dealers begin placing their own orders with GM for cars with a September introduction date. In June, the dealers begin taking orders from fleets and other accounts and submitting them to GM. (Brazill tr. 2666–68, 2721–22)

58. Rental and leasing firms such as Colonial Car Rental, Budget, and Sun Auto Rentals typically order new model GM cars months in advance of delivery. (Uliano tr. 2460–62; Korn tr. 2134; CX 2220Z–80–81 - Belzberg)

59. When rental and leasing firms such as National and Thrifty Rent-A-Car System go to purchase GM cars, the starting point for discussion is the GM factory invoice price. (Uliano tr. 2369–71; CX 5300Z–67–68Z–10 - Stemmons; Vader tr. 3047–49) [13]

60. Rental and leasing firms such as National, Thrifty Rent-A-Car System, and Sun Auto Rentals frequently buy GM cars at a price based on an agreed amount above the dealer's invoice price, without knowing what the invoice price is. (Korn tr. 2134, 2130–31; CX 5300Z–67–68 - Stemmons; CX 2220Z–80–81 - Belzberg; Uliano tr. 2369–71)

61. In purchasing a GM car, most rental and leasing firms agree to pay the factory invoice price plus a markup which usually is $50 or less. (Furman tr. 1638–39, 1625; CX 5300Z–11 - Stemmons)

62. Under the Price Protection Program, GM notifies rental and leasing firms, as well as GM dealers, that there will be price protection for all cars ordered and delivered by specified dates. GM tells the rental and leasing firms that when they take delivery of the car six months later, they will pay the price at which they ordered the car. (CX 2220Z–84–85; Uliano tr. 2460–61; Brazill tr. 2775–76) GM "want [s] to make sure that all customers are aware of those programs." (Brazill tr. 2775–76)

63. GM's announcement of price assurance is sent both to the dealer

and to the dealer's rental and leasing firm customer. (Uliano tr. 2456–57; CX 7510–I)

64. GM has some rebate programs and some bonus programs that involve only fleet customers. (Brazill tr. 2769; CX 4109F; CX 7770A; CX 7771B) For example, in 1981, GM had bonus programs for fleets. Cars transferred or delivered to the dealers' rental and leasing departments were eligible for the bonus. (CX 7770C; CX 7771–I, Y; CX 7773P–Q)

65. GM writes directly to rental and leasing firms to inform them of the amount of the GM bonus or allowance they will receive if they place an order for a GM car. (CX 4109F; CX 7510A–B, I)

66. GM sends bonuses, rebates, and allowances directly to fleet purchasers of GM cars. GM sends these purchasers a check for the money. (CX 2219C–D - Avery; CX 7728N; CX 7728P)

67. Prior to the beginning of a model year, GM has new model shows for its franchised dealers, the media, fleet users and the general public, at which its new cars are displayed and information regarding the models and equipment to be offered is made available. (McClintock tr. 1283–86; Reiter tr. 1821; Korn tr. 2134–35) [14]

68. Among product information literature, GM distributes a booklet called the Fleet Buyer's Guide. This booklet contains information on new models, standard and optional equipment, colors and trim selections. (Brazill tr. 2669; Reiter tr. 1823; Korn tr. 2136) The booklet does not contain any pricing information. (Reiter tr. 1823)

69. In support of the sales efforts on the franchised dealers, GM field personnel act as "goodwill ambassadors" who promote GM cars. (Korn tr. 2127–28; Brazill tr. 2669–70; Ashbaugh tr. 961–64; Kieffer tr. 2260; Uliano tr. 2373) These factory representatives also provide assistance to franchised dealers in solving delivery, warranty and related problems encountered by consumers. (Berg CX 7779Z–10; Nevel tr. 1070; Korn tr. 2127–28, 2140–41; Ashbaugh tr. 873; Brazill tr. 2669–70; Ashbaugh tr. 961–64; Kieffer tr. 2260; Uliano tr. 2373)

70. Certain GM factory representatives work with franchised dealers to address the "special needs" of fleet users. These representatives explain the technical specifications of GM products and equipment. (Brazill tr. 2654–58) At times, a GM representative and a GM dealer make a joint call during which the rental and leasing firm negotiates car purchases with the dealer. (Uliano tr. 2372, 2421, 2408–09; Ashbaugh tr. 868–69)

71. GM on occasion offers rebates on new GM cars. (Vader tr. 3045) Rebates are paid to franchised dealers, who may retain them or pass them on to their customers. (Vader tr. 3091) GM also has offered and paid rebates to consumers, including fleet users. (Vader tr. 3090–91; CX 7771B–D)

72. During the 1983 model year, GM offered an early order incentive program of providing free air-conditioners in sales to fleet users. Under this program, GM agreed not to charge its dealers for air-conditioners on cars they ordered by a certain date for their sales to fleet users. (Brazill tr. 2794–95; Vader tr. 3078; Kieffer tr. 2261–62)

73. Another program directed at fleet sales is the fleet distance delivery program. Under this program, GM pays a GM franchised dealer a $50 delivery allowance on his sales to large fleet users where the selling dealer is required to arrange for another dealer to make delivery of the car to the selling dealer's customer. This program helps compensate the delivering dealer for the car for receiving, inspecting, conditioning and delivering the car to the fleet consumer. (CX 7775)

74. In the late 1960's, GM offered buy-back and guaranteed value programs for its dealers' sales to fleet users. (Vader tr. 3045, 3087–88; Brazill tr. 2772, CX 7736C) GM has not had any similar fleet plans since the late 1960's. (Brazill tr. 2772) [15]

75. Under the guaranteed value program,[2] GM agreed with the dealers to guarantee a minimum used car value for the car when retired from rental and leasing service. Under the buy-back program, GM agreed to buy a used GM car after it was retired from fleet service. (Brazill tr. 2772; Vader tr. 3088–89)

76. GM notifies fleet buyers directly about various incentives for fleet orders. These incentives are free equipment or equipment at a reduced price for rental and leasing firms. (CX 7510C, I; CX 4109E; CX 5227Y; Brazill tr. 2769; Kieffer tr. 2261–62)

4. Servicing GM Cars

77. GM franchised dealers perform service on GM cars they sell to consumers. (Brazill tr. 2798; Furman tr. 1638)

78. GM extends a limited warranty to consumers of GM products, including fleet users. (Brazill tr. 2713)

79. GM's warranty covers the repair or replacement of defective parts on the consumer's car during the first 12 months or 12,000 miles of use. (CX 7744H; Ashbaugh tr. 963)

80. Ordinarily, the consumer takes the GM car to a GM franchised dealer for the performance of warranty service. (Brazill tr. 2713; Uliano tr. 2428–29; Ashbaugh tr. 963) However, under a GM in-shop warranty program fleet users who have qualified service personnel and facilities that meet certain inspection standards are permitted to service their own cars rather than bringing them to a dealer. (Brazill tr. 2774)

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[2] Cadillac, whose cars are sometimes used by rental and leasing firms, offered a guaranteed value program during the model year 1982 to rental firms. (CX 2220Z–150–51 · Belzberg)

81. Federal law imposes recall obligations on all automobile manufacturers which, when applicable, require the manufacturer to notify the consumer to bring his car in for inspection and possible adjustment by a dealer. (*See* 15 U.S.C. 1381 *et seq.* (esp. Sections 1411–1420)

5. GMAC

82. General Motors Acceptance Corporation ("GMAC") is a wholly-owned GM subsidiary. (Vader tr. 3057) GMAC is managed separately from GM, operates separate facilities, employs [16] separate personnel and makes its own independent business decisions. (Vader tr. 3053; 3064)

83. GMAC offers credit and financial services. Such services consist of "wholesale financing," "retail financing," and "dealer loans." (CX 7750G–I, K; Vader tr. 3057–58)

84. Under its wholesale financing plans, GMAC offers a service to GM dealers which enables them to stock products for sale at retail. (CX 7750G) Franchised dealers are not required to finance their purchases of new GM cars through GMAC. Many dealers finance such purchases themselves or through other lending institutions, including banks. (Vader tr. 3058; CX 3057–58; CX 7750G)

85. GMAC provides wholesale financing. Under its wholesale financing plans, GMAC finances more than 80% of the new vehicles shipped from GM factories to GM dealers. (CX 7750G) In some jurisdictions, GMAC is the only source of financing for GM dealers. (CX 7750H)

86. GMAC also provides retail financing. In 1979, GMAC financed almost 24% of the new vehicles delivered by GM dealers. (CX 7750–I)

87. GMAC purchases an installment contract from a franchised dealer, after the dealer sells a car to a customer. GMAC is not a party to the transaction between the dealer and his customer. (CX 7749G; CX 7750–I)

F. *Rental and Leasing Firms*

88. Estimates of the number of firms engaged in the rental and leasing of automobiles to the general public vary. According to the federal government's census data, in 1977, there were 4,236 establishments primarily engaged in the car rental and leasing business, with annual receipts totalling nearly $3.2 billion. (RX 58–I) According to R.L. Polk data,[3] in 1978, there were 8,927 car rental and leasing firms registering ten or more new vehicles annually. (RX 134; Vader tr. 3020–21) [17]

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[3] The R.L. Polk & Company tracks and reports data on new vehicles registered by fleet users. R.L. Polk obtains such registration data from motor vehicle departments of the various states. It then compiles and reports the data to its subscribers, which include GM. (Vader tr. 3017–19; Crawford tr. 2519)

1. Service Business

89. Rental firm witnesses all testified that they are engaged in a service business. (Ashbaugh tr. 876; Nevel tr. 1093; Quick tr. 1445; Furman tr. 1648; Reiter tr. 1860; Kieffer tr. 2317; Epplen tr. 2091; Korn tr. 2178; Belzberg CX 2220Z–122; Stemmons CX 5300Y; Avery RX 1–G)

90. Leasing firm witnesses testified that they are engaged in a service business. (Nevel tr. 1085; Quick tr. 1445; Avery RX 1D)

91. The Standard Industrial Classification ("SIC") Manual, published by the federal government's Office of Management and Budget, classified automotive rental and leasing establishments as Industry No. 7512 under the "Services" division (RX 55E, P–Q), which includes hotels and other lodging places, establishments providing personal, business, repair and amusement services, and health, legal, engineering and other professional services. (RX 55P)

92. In its 1977 Census of Service Industries, the federal government classified automotive rental and leasing firms as service establishments. (RX 58G, I)

93. The federal government classified automobile dealers in the "Retail Trade" division in the SIC manual, (RX 55M–N), which includes the "[b]uying of goods for resale to the consumer." (RX 55M)

2. Rental Firms

94. The transportation service that rental firms offer includes: providing a well-maintained, safe and clean car for driving use; offering on-airport convenience, one-way rentals, reservation systems, and prompt check-ins and check-outs; honoring various credit card and corporate billing account procedures; extending rate and insurance options; having 24–hour operations and pick-up, delivery and repair services; and offering different models and sizes of cars to suit the renter. (Kieffer tr.2317–19; Stemmons CX 5300Y–Z–4; Belzberg CX 2200Z–122–26)

95. Some rental firms feature current model year cars in their fleets. (Belzberg tr. 1541; Avery RX1G) Other firms rent older, non-current model year cars. (RX 14; RX 27; Korn tr. 2168)

96. Many rental firms maintain fleets which include a mix of model sizes to meet a range of customer preferences. (Stemmons CX 5300Z–3; CX 1614C) A few firms emphasize the [18] availability for rental of special types of vehicles, such as luxury cars, jeeps, high gas mileage rating cars, compact cars or vans. (Nevel tr. 1096; RX 13B; RX 10Q-R; CX 7506Z–165, Z–168)

97. Some rental firms offer one-way rentals, allowing the customer to rent a car at one location and return it to another. (Stemmons CX

5300Z-2-3; CX 3588D-E) Others do not. (Korn tr. 2177; Nevel tr. 1099; Quick tr. 1429-30)

98. Some rental firms maintain a toll-free 800 telephone number for their customers' use in making reservations. (Korn tr. 2177; CX 1614B; Stemmons CX 5300Z-1) Others do not. (Nevel tr. 1099; Korn tr. 2117)

99. Rental firms vary in the insurance coverage they provide for their customers. Some firms, for example, offer primary liability coverage to its customers. (Reiter tr. 1853; RX 1614B; Stemmons CX 5300Z-3) Others offer only secondary liability coverage. (Nevel tr. 1097-98) Some firms offer personal injury accident insurance. (CX 1614B) Others do not. (Korn tr. 2104)

100. Rental firms vary in their hours of operation. Some firms keep their operations open 24 hours a day, 7 days a week. (CX 1614B) Other firms limit their operations to 9-10 hours a day, 5-6 days a week. (Quick tr. 1433-34; Avery RX 1G)

101. Some rental firms maintain computerized reservation systems. (CX 1614B; Stemmons CX 5300Z-Z-1; Belzberg CX 2220Z-125) Others do not. (Nevel tr. 1098)

102. Some rental firms provide on-airport convenience. (Uliano tr. 2350-51; RX 70C; Belzberg CX 2220Z-125) Others do not. (Korn tr. 2177-78; Nevel tr. 1099)

103. Some rental firms maintain a single location. (Kieffer tr. 2239) Other firms maintain locations in only one metropolitan area (Ashbaugh tr. 841; RX 13B; Nevel tr. 1054), or in a few such areas in a single state. (Epplen tr. 2063-64; Korn tr. 2163-64) Some maintain locations on a multi-state, regional basis. (Reiter tr. 1765-66; RX 1614E; RX 107-I) Others maintain locations on a nationwide or worldwide basis and can provide rental service to their customers almost anywhere they travel. (Uliano tr. 2359; RX 72C; Belzberg tr. 1474)

104. Some rental firms have special reservation clubs, which enable them to maintain customer information on file so as to permit prompt preparation of the rental contract. (Belzberg CX 2220Z-122) Other firms do not. (Nevel tr. 1098)

105. Some rental firms require a minimum multi-day rental period. (Korn tr. 2100; RX 44B) Others impose no such rental period restrictions. (RX 82; CX 1614C) [19]

106. Some rental firms offer special services that are unique to the area they serve. For example, I.R.A. Car Rental offers its customers "instant rental on-airport service," which permits the customer to avoid the inconveniences and delays often involved in airport car rental. (Kieffer tr. 2279-80; RX 4 5-I) Under this service, I.R.A. prepares the customer's rental contract in advance and has a rental car waiting for him at the airport terminal door when his flight arrives,

with the motor running and, "cool in the summer and hot in the winter." (Kieffer tr. 2249–50, 2279–80; RX 45I) No other rental firm in I.R.A.'s area provides a similar service. (Kieffer tr. 228)

a. *Rates*

107. The rates charged by rental firms for their transportation service vary substantially among firms. (Ashbaugh tr. 936; Reiter tr. 1837)

108. Examples of the rate differences among rental firms operating in the same vicinity include:

(a) In Denver, Hi-Country Rental charged rates that were lower than National's whose were lower than Avis' and Hertz's. (Epplen tr. 2082)

(b) In Minneapolis, I.R.A. Car Rental's commercial account rates are 10 to 15 percent lower than those offered by Hertz, and its over-the-counter rates are about 40 percent lower than Hertz's. (Kieffer tr. 2257–59)

(c) In Houston, Ashbaugh Auto Rental Service offers rates that are lower than the national rental firms. (Ashbaugh tr. 936)

(d) At its airport locations around the country, Ajax Rent-a-Car charged rates that were up to 40 percent lower than Hertz's, Avis' and National's. (CX 804; CX 809)

109. Rental firms may charge different rates for renting identical makes and models in the same vicinity at the same time. Thus, in late December 1974 in Florida, Hertz charged $119 per week for renting a Chevrolet Vega, while Atlantic Rent-a-Car charged $54 per week for the same model. (CX 1611A) In late 1978 in California, Hertz charged $41.95 for a one-day, 100– [20] mile rental of a Buick Regal, while Ajax charged $19.90 for the same rental on the same model (CX 4305C); and, Aero Rent-a-Car charged $15.95 for a one-day, 100–mile rental of a Ford Fiesta, while Aztec Rent-A-Car charged $9.99 for the same rental on the same model. (CX 4305D, N) In early 1979 in Florida, Avis charged $16.95 per day for renting a Chevrolet Chevette, while Greyhound Rent-a-Car charged $13 per day for the same model. (CX 2065Z–42)

110. A rental firm also may charge different rates to different customers for renting identical makes and models. National, Hertz and Avis, for example, negotiate with customers and their rates may vary among customers. (Uliano tr. 2364–66, 2463–64)

b. *Customers*

111. Customers for rental cars vary. Some firms focus on commercial or business travellers. (Kieffer tr. 2248–49; Epplen tr. 2079–80;

Stemmons CX 5300U; RX 143F) Others do not. (Korn tr. 2165) Some firms concentrate on obtaining rental business from tourists or vacation travellers. (Korn tr. 2165; Reiter tr. 1799) Others do not. (Avery RX 1F-G) Some rental firms actively solicit insurance replacement rental business. (Kieffer tr. 2325; Ashbaugh tr. 932–33; Quick tr. 1390) Others do not. (Korn tr. 2166; Stemmons CX 5300S-T)

112. Some firms specialize in local or neighborhood rentals. (Avery RX 1F; Stemmons CX 5300T) Others do not. (Korn tr. 2166–67) Some firms focus on rental business from hotel concessions. (Never tr. 1092) Others do not. (Reiter tr. 1834) Some rental firms, such as Rent-a-Wreck and Ugly Duckling Rent-a-Car, concentrate on obtaining rental business for older used cars at lower rates. (RX 125; RX 126; RX 128) Other firms do not. (Ashbaugh tr. 957; Belzberg CX 2220Z–9; Stemmons CX 5300T-U) [21]

3. Leasing Firms

113. Leasing firms offer a transportation service, which varies among firms, but may include: providing a well-maintained, safe and clean car; extending rate and insurance options; providing maintenance and repair services and the use of a loaner car; arranging for licensing, pick-up and delivery; making recommendations regarding suitable cars and appropriate colors and equipment for the lessee's needs; providing computerized cost information and reports to fleet leases; and offering different models and sizes to suit the lessee. (Oshry tr. 1903–05; 1944; RX 40A-F; Quick tr. 1387–88; Avery RX 1D: RX 2A-F; CX 2076A-F; CX 4405E-N; RX 142C)

114. Some leasing firms operate only locally. (Quick tr. 1387; Nevel tr. 1086–87) Other leasing firms operate regionally. (McDougal CX 3244L-M) Some firms are engaged in leasing cars nationwide. (Quick tr. 1389; RX 2B; RX 142C)

115. Some leasing firms lease cars to individuals. (Nevel tr. 1087; Avery RX 1D) Other firms lease cars to businesses. (RX 2A-F) Some firms lease to both. (CX 2076A-F)

116. Leasing rates for an identical make and model car may vary among leasing firms and among a single leasing firm's customers because of differences in the leasing services, a customer's bargaining skill, the depreciation anticipated, and the length of the lease. (Oshry tr. 1943–44; Nevel tr. 1059–60; Avery RX 1D)

4. Purchase of New Cars

117. Rental and leasing firms purchase new GM cars from GM franchised dealers. (Ashbaugh tr. 886, 892; Nevel tr. 1033; Furman tr. 1649; Reiter tr. 1812; Epplen tr. 2077; Oshry tr. 1935–36; Oshry RX

42B; Uliano tr. 2430, 2453–55; RX 50; McDougal CX 3244Z–37; Stemmons CX 5300Z–9; Belzberg CX 2220Z–132; Vader CX 7780Z–16)

118. The prices and other terms and conditions at which rental and leasing firms buy new GM cars are negotiated between the purchasing firm and the selling franchised dealer. (Kieffer tr. 2291–92; Nevel tr. 1106; Reiter tr. 1830–32; Uliano tr. 2430, 2452; Stemmons CX 5300Z–9; Oshry tr. 1935–36; Oshry RX 42B; Ashbaugh tr. 926)

119. Rental and leasing firms sometimes negotiate with a GM franchised dealer for the purchase of new GM cars which are planned for the forthcoming model year prior to the time when GM [22] has announced the prices. (Korn tr. 2134) On those occasions, the rental and leasing firms and the selling dealers may agree upon a purchase price that is above or below the yet-to-be-announced dealer invoice price. (Korn tr. 2131)

120. Rental and leasing firms decide which makes and models to acquire for their fleets based on a variety of factors: the prices offered by dealers; operating costs, including depreciation, maintenance and repair expense; customer preferences; reliability; and resale value. (Reiter tr. 1825; Stemmons CX 5300Z–13–14; Belzberg CX 2220Z–134; Berg CX 7779Z–181–82; Oshry tr. 1911–12; CX 7755B)

5. Cars As Assets

121. Rental and leasing firms use automobiles by renting and leasing them to a customer who drives the car on the road. (Ashbaugh tr. 877) Cars used in rental and leasing service accumulate mileage and suffer wear and tear. (Ashbaugh tr. 885; Oshry tr. 1956–57)

122. The length of time that rental and leasing firms use cars in fleet service varies. The record shows the period of time for certain firms:

(a) All-State Vehicle Leasing—24 to 26 months (Oshry tr. 1903);
(b) Ashbaugh Auto Rental Service—1 to 2 years (Ashbaugh Tr. 865);
(c) Budget Rent-a-Car—12 months (Belzberg CX 2220Z–108);
(d) General Rent-a-Car—14 months (Reiter tr. 1825);
(e) I.R.A. Car Rental—12 to 18 months (Kieffer tr. 2254);
(f) Thrifty Rent-a-Car—1 year (Stemmons CX 5300Z–7); and
(g) Trans Rent-a-Car—12 to 18 months (Furman tr. 1650).

123. The mileage that rental and leasing firms accumulate on cars while in fleet service varies. The record shows the mileage at which some rental and leasing firms retire their cars [23] from fleet service:

(a) All-State Vehicle Leasing—48,000 to 52,000 miles (Oshry tr. 1903, 1916);

(b) Ashbaugh Auto Rental Service—17,000 to 24,000 miles (Ashbaugh tr. 908);

(c) Budget Rent-A-Car—24,000 miles (Belzberg CX 2220Z–109);

(d) General Rent-A-Car—somewhere in the mid-20,000 range (Reiter tr. 18260;

(e) I.R.A. Car Rental—12,000 to 15,000 miles (Kieffer tr. 2254–55)

(f) Thrifty Rent-A-Car—20,000 miles (Stemmons CX 5300Z–7); and

(g) Trans Rent-A-Car—18,000 to 27,000 miles (Furman tr. 1650).

124. The average useful life of a GM car is about twelve years, ranging from 100,000 to 150,000 miles. (CX 7751N, Nevel tr. 1074; Ashbaugh tr. 866–67) Rental and leasing firms generally do not fully use or consume automobiles in their fleets. Ordinarily, cars used in rental and leasing service are disposed of before their useful life has expired. (Nevel tr. 1074)

125. Rental and leasing firms consider a variety of factors in determining when to dispose of a used car out of their fleets. Ashbaugh Auto Rental Service, for example, looks at car's time in fleet use, its odometer reading and its current used car market value. (Ashbaugh tr. 865, 980) Colonial Car Rental considers the condition of the used car market and the prevailing market prices for used cars. (Uliano tr. 2431)

126. Cars disposed of out of the fleets of rental and leasing firms are used cars. (Ashbaugh tr. 887; Quick tr. 1436–37; Oshry tr. 1958; Uliano tr. 2431; Stemmons CX 5300Z–8; Belzberg CX 2220Z–130) [24]

127. Rental and leasing firms dispose of cars out of their fleets at used car prices. (Ashbaugh tr. 895; Kieffer tr. 2316; Stemmons CX 5300Z–8) The prices such firms receive for their used cars depend on a variety of factors including the used car market, the individual condition of the car being sold, and its popularity as a used car. (Furman tr. 1663; Ashbaugh tr. 967; Reiter tr. 1839; Oshry tr. 1957)

128. Rental and leasing firms use several different distribution channels to dispose of used cars out of their fleets, including sales through auto auctions, sales to used car wholesalers, sales to used car dealers, and sales to the general public. (Nevel tr. 1043–44; RX 68B-D)

129. Rental and leasing firms occasionally scrap cars from their fleets when they are wrecked (Kieffer tr. 2316; Ashbaugh tr. 914–15; RX 5E) Rental and leasing firms occasionally have cars stolen from their fleets. (Ashbaugh tr. 913–14; RX 5D)

130. Some rental and leasing firms may dispose of used cars out of their fleets by transferring or selling them to used car lots. Pershing Auto Leasing, for example, has a used car dealer's license and maintains a separate used car lot, which buys and sells used cars, takes trade-ins, and rehabilitates used cars. (Nevel tr. 1083–85) Pershing advertises its used cars for sale in the used car classified section of the newspaper, which includes advertisements placed by used car lots and

private individuals selling their own used automobiles. (RX 15A-B; Nevel tr. 1112, 1114–15)

131. Rental and leasing firms do not sell or resell new GM cars. (Ashbaugh tr. 887; Furman tr. 1649; Korn tr. 2169; Kieffer tr. 2320; Oshry tr. 1937; Stemmons CX 5300Z–5; Belzberg CX 2220Z–128)

132. Rental and leasing firms capitalize cars used in rental and leasing service as assets on their accounting books and records, and do not treat such cars as inventory held for resale. (Ashbaugh tr. 888, 919; RX 6B; Kieffer tr. 2309)

133. Rental and leasing firms enter new cars they acquire for their fleets on their books and records at the price paid to the selling dealer. (Kieffer tr. 2311; Oshry tr. 1940) That amount is the initial book value assigned to the asset. (Ashbaugh tr. 893)

134. Cars are depreciated on rental and leasing firms' books and records while the cars are in fleet service. (Kieffer tr. 2310) The depreciation taken reduces the book value of the asset. (Ashbaugh tr. 893) [25]

135. The depreciation taken by rental and leasing firms on cars in fleet service reflects the change in condition and reduction in value through use in the fleet, the accumulation of mileage and wear and tear, and the passage of time. (Reiter tr. 1832; Quick tr. 1435–36; RX 69H; RX 70–I)

136. Rental and leasing firms treat depreciation as one of the expenses or operating costs of their businesses. (Furman tr. 1658; Kieffer tr. 2311; Reiter tr. 1833; Korn tr. 2174; RX 69E; RX 70E)

137. When rental and leasing firms dispose of cars out of their fleet for an amount different from the depreciated book value, the firms adjust the depreciation taken on the cars to reflect either an increase or a decrease in the depreciation expense. (Kieffer tr. 2312; Furman tr. 1657; Oshry tr. 1958–59)

138. When the used car is sold for more than its depreciated book value, the difference reduces the depreciation expense. Conversely, if the car is sold for less than its depreciated book value, the difference increases the depreciation expense. (Ashbaugh tr. 894; Reiter tr. 1833; Oshry tr. 1958–59)

139. In disposing of used cars after taking them out of fleet service, rental and leasing firms do not receive a "markup" or "profit" on the sale, since such cars are typically sold as used cars for substantially less than the firm paid to acquire them as new cars. (Stemmons CX 5300Z–8–9; Furman tr. 1665)

G. *Contracts With Customers*

140. During the agreed rental or lease period, the rental and leasing firms retain title to and ownership of the car. (Oshry tr. 1947; Oshry

RX 42D-E; Belzberg CX 2220Z–126) The agreements used by rental and leasing firms explicitly recognize the firm's continuing ownership of the car during the rental period. (RX 3B, ¶ 2; RX 28B, ¶ 1; RX 28D, ¶ 1; RX 43B, ¶ 1; RX 49B, ¶ 1; RX 132B, ¶ 2)

141. The rental and leasing firm's customer must return the car to the firm at the end of the stated time. (Ashbaugh tr. 879–80; RX 3B, ¶ 2; Belzberg CX 2200Z–127–28; RX 28B, ¶ 1) However, regardless of the stated time period, the agreements used by rental firms in renting cars to their customers generally provide that the firm may, in its discretion, demand [26] that the rented car be returned at a sooner time and seize the car at any time or place. (Ashbaugh tr. 883–84; RX 3B, ¶ 6; Kiefer tr. 2339; RX 49B, ¶ 2)

142. The agreements used by rental and leasing firms contain restrictions on the customer's temporary use of the car. For example, such agreements may prohibit the renter from using the car: in violation of any law or for any illegal purpose; to propel, push or tow any vehicle, trailer or object; in any race, speed test or contest; for transportation of persons or property for hire; while the odometer is not functioning properly; while under the influence of intoxicants or narcotics; to instruct an unlicensed driver; or out of the state. (Kieffer tr. 2339–40; RX 49B, ¶ 4; RX 3B, ¶ 3; Korn tr. 2177; RX 43B, ¶ 8; RX 28B, ¶ 2; RX 28D, ¶ 2; RX 132B, ¶ 7)

143. Rental and leasing firms recognize in the agreements that their cars will accumulate mileage and suffer wear and tear during the rental period. (Ashbaugh tr. 885; RX 3B, ¶ 2; RX 28B, ¶ 1; RX 28D, ¶ 1; RX 43B, ¶ 6; RX 49B, ¶ 2; RX 132B, ¶ 3) Customers are not responsible for normal wear and tear incurred during the time they have temporary use of the car and that cost is borne by the rental and leasing firm. (Nevel tr. 1103; Ashbaugh tr. 882–83)

H. *Advertising Agreements*

144. GM purchases advertising from some rental and leasing firms. (Complaint, ¶ 5; Answer, ¶ 5) Under these agreements, the rental and leasing firms agree to feature in their advertising current model GM cars by name and picture, and GM agrees to pay a portion of the advertising cost up to a maximum. (CX 1010; CX 3418)

145. In addition to showing GM cars, the advertising may provide two additional benefits to GM. One is an endorsement from a rental and leasing firm which may be perceived as a sophisticated buyer and consumer of new cars by the general public. (Stemmons CX 5300Z–62–63; Brazill tr. 2705–06)

146. The other benefit is the demonstration value in which the picture of a GM car may stimulate interest in a potential purchaser

to consider test-driving the car. (Stemmons CX 5300Z–24; Vader CX 7780Z–29; Reiter tr. 1851; Quick tr. 1412–13; RX 115H, V, X)

147. GM purchases rental and leasing advertising by corporate or divisional advertising agreements with such firms. Under a corporate contract, the rental and leasing firms agree to feature in their advertising current model GM cars from the [27] various GM divisions. Under divisional agreements, the firms agree to feature in their advertising current model GM cars from a particular division. (McClintock tr. 1307–08; Vader CX 7780Z–56–57, tr. 3002)

148. Requests for advertising agreements are initiated by rental and leasing firms. (McClintock tr. 1158; Berg CX 7779Z–11; Vader CX 7780Z–25) GM does not solicit advertising agreements from rental and leasing firms because GM receives sufficient requests to meet its needs. (McClintock tr. 1159; Berg CX 7779Z–30)

149. In requesting advertising agreements, rental and leasing firms normally outline their proposed advertising program, including the types of advertisements and media they intend to use, their advertising budget, and the amount of GM's requested participation in the program. (Berg CX 7779Z–17; Brazill tr. 2788; Reiter tr. 1780–81; Stemmons CX 5300Z–21–23; Belzberg CX 2220Z–139; RX 107A-Z–1; RX 109A-G)

150. In requesting an advertising agreement, rental and leasing firms include information and projections about the number of cars in their fleet. (CX 2112)

151. GM evaluates rental and leasing firms' requests for advertising agreements by looking at: the nature and scope of the firm's marketing plans and advertising program; the nature and scope of its operations; its integrity, reputation and image; its financial stability and competitive vitality; its historical fleet composition and size, and the way in which its fleet is maintained; and the availability of funds for rental and leasing advertising. (McClintock tr. 1161–64; Vader tr. 3004; Vader CX 7780Z–24–25, Z–39–40; Berg CX 7779Z–64–65)

152. In evaluating the nature and scope of rental and leasing firms' advertising program, GM considers the types of advertisements and media that the firm has been using and proposes to use for future advertising and considers whether the mix and variety of media are similar to those that GM itself would choose for its advertising. (McClintock tr. 1293) On the basis of its review, GM makes an assessment of the advertising value offered by the requesting firm's program. (Brazill tr. 2786; Vader tr. 3030–31)

153. GM is interested in rental and leasing advertising programs of broad regional or nationwide scope that call for placement of advertisements in a variety of media, with frequent insertions so that the advertising would appeal to a cross-section of the consuming public.

(McClintock tr. 1163; Vader [28] tr. 3004) With regard to types of media, GM is interested in rental and leasing advertising appearing on the television and radio, and in national magazines, inflight magazines, newspapers and other media. (McClintock tr. 1293–94)

154. GM considers a requesting firm's historical fleet composition to ascertain whether the firm has been using GM cars. (McClintock tr. 1162; Berg CX 7779Z–96)

155. GM also considers historic information on the size of a requesting firm's fleet and operations. (Berg CX 7779Z–115; Reiter tr. 1781–82; McClintock tr. 1170)

156. In its evaluation process, GM generally finds that leasing firms are unable to offer as much advertising value in terms of product exposure and demonstrative value as rental firms. (Brazill tr. 2704) Leasing firms typically advertise less frequently than rental firms and in a media whose circulation is more limited. In addition, leasing firms generally offer lower demonstration value than rental firms because cars in leasing service are typically test-driven by fewer potential new car buyers than cars in a rental fleet. (Vader tr. 3011)

157. Due to these differences in relative advertising value, most of GM's advertising agreements have been with rental firms rather than leasing firms. For the same reason, GM's purchases of advertising from leasing firms are generally for smaller dollar amounts than its rental advertising expenditures. (Brazill tr. 2704–05)

158. The amount of money GM pays for rental and leasing firms' advertising depends on GM's opinion of the advertising value offered, GM's effort to get the best deal it can for its advertising dollar, and the results of negotiations between GM and the requesting firm. (Brazill tr. 2685–86, 2704–05, 2743; McClintock tr. 1344, 1357)

159. GM has not purchased advertising from rental and leasing firms that simultaneously have advertising affiliations with another automobile manufacturer. (Vader tr. 3036–37)

1. Terms of Agreement

160. All advertising agreements between GM and rental and leasing firms provide that the rental and leasing firms' advertising and promotional materials specifically refer to current model GM vehicles. (CX 1010A-B, N-O, Z-Z–1) [29]

161. Some advertising agreements executed between GM and rental and leasing firms provide that all of the rental and leasing firms' advertising and promotional materials shall use:

> (a) . . .
>
> (i) A pictorial reproduction acceptable to [GM] of a current model [GM] passenger car and/or truck;

> (ii) The name of such [GM] passenger car and/or truck at least once in the phrase "[Rental/Leasing Firm] will provide a [GM] passenger car or truck or other passenger car" or a similar phrase acceptable to [GM]:
>
> With such pictoral reproductions and phrases to be at least as prominent as the manner in which such pictorial reproductions and phrases of that character appear in the samples of advertising material and promotion material heretofore submitted to [GM] by [Rental/Leasing Firm].
>
> (b) [Rental/Leasing Firm] shall not use or permit the use of, in any advertising material and/or promotion material for which reimbursement is claimed under the terms of this Agreement,
>
> (i) Any statement that is detrimental to the goodwill of [GM] or that disparages any vehicle manufactured by [GM];
> (ii) Any pictorial reproductions of a vehicle manufactured by any manufacturer other than [GM]; or
> (iii) Any reference to any manufacturer other than [GM] or the trade name of any vehicle other than a vehicle manufactured by [GM].

(*E.g.*, CX 1010D-E, Q-R, Z-3-4; CX 3418J-K; CX 5226Z-62-63, Z-74-75, Z-86-87) **[30]**

162. Some advertising agreements executed by GM and rental and leasing firms provide that all of the rental and leasing firms' advertising and promotional material shall use:

> (i) A distinct picture of a current model [GM] vehicle that is specifically identified in each advertisement.
> (ii) The specific phrase "We feature [GM] cars and/or trucks" and any other phrase acceptable to [GM].
> In all printed advertising material and promotional material listed in paragraphs 2(a) and 2(b), the [GM] vehicle picture and feature statement shall, wherever possible, represent a minimum of 20% of the total size of the advertisement.

(*E.g.*, CX 2192E; CX 2064D-E; CX 4421E)

163. All advertising agreements executed between GM and rental and leasing firms provide that:

> 10. This Agreement is not made in connection with or as part of any transaction relating to the sale of any [GM] products, and nothing contained herein shall be construed as (a) an obligation of [Rental/Leasing Firm] to purchase or influence the purchase of any such products either from [GM] or others, or (b) an obligation on part of [GM] to supply [Rental/Leasing Firm] with any such products.

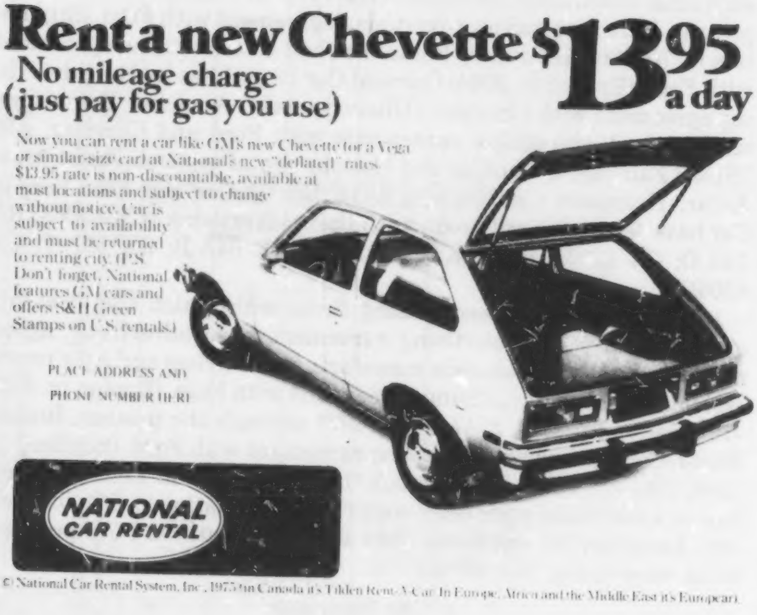
(*E.g.*, CX 1010J-K, W-X, Z-9-10; CX 3418P-Q; CX 5226Z-68-69, Z-80-81, Z-92-93)

164. Pursuant to the terms of the advertising agreements, GM monitors the advertising of rental and leasing firms under the contracts and regularly audits all reimbursements claimed. (Belzberg CX 2220Z-142; Anderson tr. 2808-09, 2813-17) **[31]**

165. The advertising agreements call for GM to reimburse the rental and leasing firm for 50 percent of its qualifying advertising expenditures up to a certain negotiated maximum amount. (CX 1010; CX 3418; CX 5226)

2. Typical Advertisement

166. The following is an example of a print advertisement reimbursed by GM under an advertising agreement (RX 78): [32]



Rent a new Chevette $13.95 a day

No mileage charge
(just pay for gas you use)

Now you can rent a car like GM's new Chevette (or a Vega or similar-size car) at National's new "deflated" rates. $13.95 rate is non-discountable, available at most locations and subject to change without notice. Car is subject to availability and must be returned to renting city. (P.S. Don't forget, National features GM cars and offers S&H Green Stamps on U.S. rentals.)

PLACE ADDRESS AND
PHONE NUMBER HERE

© National Car Rental System, Inc., 1975 (In Canada it's Tilden Rent-A-Car. In Europe, Africa and the Middle East it's Europcar.)

[33] 167. Television commercials are also reimbursed by GM under its advertising agreements. (CX 10000; CX 2043A-B; CX 2044A-B; CX2045A-B; CX 2046A-B)

3. Competitors' Advertising Agreements

168. Certain rental and leasing firms with which GM has not entered into an advertising agreement have had advertising agreements with other automobile manufacturers. From at least 1972 through the present, Hertz has had an advertising agreement with Ford. (Stipulation tr. 705–06) Hi-Country Rental has had an advertising agreement with Ford. (Epplen tr. 2084) Colonial Car Rental has had an advertising agreement with Chrysler. (Uliano tr. 2417) Americar Rental System has had advertising agreements with Ford and Chrysler. (CX 7516A) Fairway, Econo-Car and Holiday rental systems, Aztec Rent-A-Car, Thompson Car Rentals, A-OK Rent-A-Car and Aero Rent-a-Car have featured Ford products in their advertising. (CX 4306F; RX 74A-D; CX 4306I; RX 10K; CX 4306H; RX 64A-B; CX 5310T; CX 4305D)

169. Certain rental and leasing firms with which GM does not currently have an advertising agreement have advertising agreements with other automobile manufacturers. Payless and Ajax rental systems have had advertising agreements with Ford. (Epplen tr. 2075–76; Kieffer tr. 2240, 2247) From 1977 through the present, Budget Rent-a-Car has had an advertising agreement with Ford. (Belzberg tr. 1548, 1551–53) From 1975 through the present, Dollar Rent-a-Car has had an advertising agreement with Ford. (Stipulation tr. 651–52, 2582–84) American International Rent-a-Car has featured Ford products in its advertising. (CX 4306K)

4. GM Payments

170. From 1976 through 1978, GM entered into advertising agreements with numerous rental and leasing firms. (CX 7733C-F) Pursuant to these agreements, GM paid money to rental and leasing firms ranging from approximately $6,013 to Leasing Associates during 1976, to $8,145,005 to National in 1978. (CX 7733K-L)

171. GM's advertising payments to selected rental and leasing firms during 1976–1978, were as follows (CX 7731A): [34]

COMPARISON OF GENERAL MOTORS CORPORATION'S ADVERTISING PAYMENTS TO SELECTED COMPANIES IN THE PERIOD 1976-1978

A Selected Vehicle Rental And/Or Leasing Companies	B General Motors Corporation's ("GM's") Payments In The Period 1976-1978	C Number Of GM Vehicles Purchased Or Registered By Each Column A Company In The Period 1976-1978	D GM's Payments On A Per Vehicle Basis
Airways Rent A Car System	$ 0	7,230	$ 0
Ajax Rent-a-Car, Inc.	297,031	3,395	87.49
All-State Vehicles, Inc.	45,000	4,999	9.00
American Int'l Rent A Car System	0	11,198	0
Avis Rent A Car System, Inc.	4,021,732	26,308	152.87
Budget Rent-a-Car Corp.	3,528,588	30,752	114.74
Dollar Rent A Car System	0	4,827	0
Econo-Car Int'l System	0	2,746	0
Four Wheels Company	196,954	31,065	6.34
Full Service Car Rental System	0	756	0
Greyhound Rent-a-Car	187,279	3,003	62.36
Leasing Associates	16,713	2,265	7.38
National Car Rental System	18,993,035	118,347	160.49
Pershing Auto Leasing, Inc.	0	537	0
Rollins International, Inc.	62,007	4,233	14.65
Thrifty Rent-a-Car Systems, Inc.	859,997	14,349	59.93

CX 7731-A (Revised) **[35]**

172. Since 1976, GM has had advertising agreements with 12 to 15 rental and leasing firms in any year. (CX 7780Z–65–66)

173. Rental and leasing systems direct their franchised licensees as to what cars to buy (CX 2217B) and rely on the licensees' marketing power when soliciting advertising payments from GM. (CX 4033W) GM calculates its cost of advertising on a per car basis for all cars purchased by the system, including those purchased by licensees. (CX 2218E). The licensees are reimbursed for local advertisements as well as receiving the benefit of the advertising for which GM pays the rental system. (CX 2220Z–70–71; CX 2714C; Quick tr. 1397; CX 4037F-G, P; CX 4062G, I; CX 4421C; CX 2064C; McClintock tr. 1180; CX 2219G)

174. In 1978, GM paid the following amounts to the following rental and leasing firms pursuant to advertising agreements (CX 7731C-F):

Ajax Rent-a-Car, Inc	$ 177,4432
All-State Vehicles, Inc.	25,000
Avis Rent A Car System, Inc.	4,021,732
Chestnut Fleet Rentals, Inc.	21,565
The Curry Corporation	12,428
Emkay, Inc.	6,567
Four Wheels Company	102,781
General Rent-a-Car	45,268
Genway Corporation	46,909
Greyhound Rent-a-Car	173,514
Leaseway Transportation Corporation	47,904
Leasing Associates, Inc.	8,057
National Car Rental System, Inc.	8,145,005
Rollins International, Inc.	33,494
Thrifty Rent-a-Car Systems, Inc.	325,000

175. In deciding what dollar amount to pay in an advertising agreement GM analyzes the rental and leasing firms' fleet size, fleet make-up by manufacturer, past car purchases, and past growth rate. GM also analyzes that rental and leasing firms' anticipated car purchases and projected growth rate for the upcoming model year. (CX 7780Z–27; CX 7779Z–70–71; CX 2213G; CX 3418B; CX 5221E)

176. In evaluating a proposed advertising agreement, GM obtains information for estimating the number of GM cars in the rental and leasing firms' fleet. (CX 7779Z–117–18; CX 7780Z–27–28)

177. GM evaluates proposed advertising agreements on a cost per unit basis, by dividing the cost of a proposed advertising **[36]** agreement by the number of GM cars registered to those rental and leasing firms. (CX 7780Z–28 - Vader; CX 4026; CX 4017B-C; CX 2112–I)

178. GM entered into advertising agreements with National, at least in part, to increase rental fleet sales. In 1970, a GM official gave the history of those agreements (CX 4019C-D):

> During the 1966 model year, General Motors' participation in daily rental fleet sales had declined to 22% with second cycle participation estimated at only 12%. Ford had entered into agreements with Hertz and National Car Rental while Chrysler had arranged similar agreements with Avis. General Motors' products were, as a practical matter, not available at airport daily rental counters.
>
> To improve General Motors' position in daily rental fleet sales and to again make our products available through airport rental stations and, thereby, derive the exposure and demonstration advantages, negotiations were entered into with National Car Rental late in 1966. The result of these negotiations was the current General Motors-National Car advertising and service agreements which took effect on January 1, 1967.
>
> * * * * * * *
>
> During 1976, the year prior to the National Car Rental agreements, General Motors' participation with this account was 39.8%. Since the inception of the agreement, the lowest level of General Motors' participation was 62.9% with our estimates indicating continued improvement .... It is also important to note volume projections made prior to the original agreement were based on approximately 216,000 total National Car Rental purchases 1967 through 1971 and 130,000 General Motors purchases .... [C]onservative General Motors' estimates indicate [37] National will exceed the figures by a minimum of 47,000 units, and based on National Car Rental figures, the original estimates will be exceeded by more than 100,000 units. We are estimating, with an extended agreement, National Car Rental purchases 1967 through 1972 will total 352,000, of which 68%, or 240,000 will be General Motors' products.

179. In the early 1970's, GM amended an advertising agreement with National by reducing the dollar amount of the agreement because of National's discontinuance of certain rental and leasing operations which was expected to result in reduced National purchases of GM cars. (CX 4026; CX 4017)

180. The following list includes all rental and leasing firms that had advertising agreements with GM at any time during the period 1966 to 1978:

1. Airways (CX 7779Z–189, Z–11–13)
2. Ajax Rent-a-Car, Inc. (CX 7779Z–188, Z–11–13)
3. All-State Vehicles, Inc. (CX 7779Z–188, Z–11–13)
4. American International Rent-a-Car Corporation (CX 7779Z–189, Z–11–13)
5. Atlantic General ("General") (CX 7779Z–188, Z–11–13)
6. Avis Car Leasing (CX 2016A-I; CX 7779Z–189, Z–11–13)
7. Avis Rent A Car System, Inc. (CX 2064A-N)
8. Briggs Leasing (CX 7779Z–189, Z–11–13)
9. Budget Rent-a-Car Corporation (CX 7779Z–188, Z–11–13)
10. Chestnut Fleet Rent-a-Car Corporation (CX 7779Z–188, Z–11–13)
11. The Curry Corporation (CX 7779Z–188, Z–11–13)
12. Dollar Rental Car Systems (CX 7779Z–189, Z–11–13)
13. Emkay, Inc. (CX 7779Z–188, Z–11–13)

14. Four Wheels Company (CX 7779Z–188, Z–11–13)
15. Genway Corporation including the GM dealer division of Genway, Cars for Commerce, and Chevway (CX 7779Z–188, Z–11–13; CX 3235A-L; CX 3243A-B; CX 3244Z–3)
16. Greyhound Rent-a-Car (CX 7779Z–189, Z–11–13)
17. Hilton (CX 7779Z–189, Z–11–13)
18. Kincar (CX 7779Z-189, Z–11–13) [38]
19. Leaseway Transportation Corporation (CX 7779Z–188, Z–11–13)
20. Leasing Associates, Inc. (CX 7779Z–188, Z–11–13)
21. Luby Leasing (CX 7779Z–189, Z–11–13)
22. National Car Leasing System, Inc. (CX 7779Z–188, Z–11–13)
23. O. Hodgkins Sales Corp. ("Minicost") (CX 7779Z–189, Z–11–13)
24. Olins of New York (CX 7779Z–189, Z–11–13)
25. Payless Car Rental (Kieffer, tr. 2240)
26. Rollins International, Inc. (CX 7779Z–188, Z–11–13)
27. Thrifty Rent-A-Car System, Inc. (CX 7779Z–188, Z–11–13)
28. Trans (CX 7779Z–189, Z–11–13)
29. Transportation Vehicles, Inc. (CX 7779Z–189, Z–11–13)
30. Valcar (CX 7779Z–189, Z–11–13)
31. Yellow (CX 7779Z–189, Z–11–13)

181. The following rental and leasing firms had advertising agreements with GM since 1978:

1. Ajax Rent A Car, Inc. (CX 817A-K)
2. All-State Vehicles, Inc. (CX 1010Z-Z–11)
3. Avis Rent-A-Car Systems, Inc. (CX 2064A-N)
4. Curry-General Rent-A-Car, Inc. ("General") (CX 1615A-K; Reiter tr. 1772)
5. Genway Corporation (including Chevway, a division of Genway operating through Chevrolet dealers, and Cars for Commerce) (CX 3243A-B)
6. Greyhound Rent A Car (CX 3430A-L)
7. Leaseway Transportation Corporation (CX 3904A-K)
8. National Car Rental System, Inc. (CX 4421A-M)
9. Thrifty Rent A Car System, Inc. (CX 5300Z–34–35, G-H)

I. *Competition Among Rental and Leasing Firms*

1. Price Competition

182. Budget, Thrifty, Avis and National compete with comparative price advertising of GM cars. (CX 2210B; CX 2220Z–121 - Belzberg; CX 4305K; CX 4305J) Independent rental and leasing firms like Paige

also compete with comparative price advertising of GM cars. (CX 4305L) [39]

183. Eric D. Uliano, who had been a station manager for National, testified that he made rate surveys, calling all car rental locations in the area. (Uliano tr. 2361–63) National competes with GM dealers in renting cars. (Uliano tr. 2366)

184. Colonial Car Lease Company conducts rate surveys on rental cars by calling Hertz, Avis, National, Budget, Dollar, and Ajax. (Uliano tr. 2410) Colonial competes with GM dealers in renting cars. (Uliano tr. 2412, 2470)

185. "Off-airport" rental and leasing firms like I.R.A. may charge from 10% to 40% lower rates on the same cars rented by "on-airport" competitors like Hertz, Avis and National. (Keiffer tr. 2259)

2. Airport Rental and Leasing Firms

186. An "on-airport" rental location is a location that has a booth in an airport terminal. (Belzberg tr. 1479; Nevel tr. 1057)

187. An "off-airport" rental location is a location that is close to and serves an airport, but does not have a booth in the airport terminal. (CX 2220P - Belzberg; Kieffer tr. 2258)

188. Thrifty Rent-A-Car and General Rent-A-Car have all or virtually all off-airport locations. (Reiter tr. 1788–89; CX 1614; CX 5300G-H, S - Stemmons) Thrifty and General are favored rental and leasing firms. (Reiter tr. 1772; CX 7732R; CX 7733D, F)

189. Some off-airport rental and leasing firms are located less than one mile from the airports served by them. (Uliano tr. 2404–05; Reiter tr. 1795; CX 1614D-H; Nevel tr. 1044, 1121) The time that it takes off-airport rental and leasing firms to transport a deplaning customer to his rental or leased car often varies only slightly from on-airport rental and leasing firms. (Reiter tr. 1788–91, 1811; CX 1614D-H; Nevel tr. 1121–22)

190. In Florida, there are many off-airport rental and leasing firms, including those favored by GM advertising agreements as well as disfavored firms, in the same vicinity as the off-airport rental locations of General Rent-A-Car, a favored rental and leasing firm. In Fort Lauderdale, for example, General is approximately one mile north of the airport terminal building; there are other off-airport rental locations on the same street as General, including Dollar Rent-A-Car, Budget, Greyhound Rent-A-Car, Alamo Rent-A-Car, Sun Auto Rentals [40] of Florida, Swad, Gold Coast, Charter, and one or two others. While Budget and Greyhound have booths in the terminal, they still maintain off-airport lots for their rental cars. Outside the Miami airport, Dollar, Greyhound, Budget, Alamo, Pershing Auto Leasing, Thrifty Rent-A-Car, and some other rental and leasing firms have

rental locations in the vicinity of General; Dollar, Greyhound, and Budget have booths in the airport terminal, but still maintain off-airport lots. (Reiter tr. 1795–98)

191. Off-airport rental and leasing firms, including GM dealer rental and leasing firms, often have direct telephone lines in airport terminals. (Uliano tr. 2414–25; Reiter tr. 1793–94; CX 2219F-G - Avery; Quick tr. 1392)

192. Off-airport rental and leasing firms, including GM dealer rental and leasing firms, compete with on-airport rental and leasing firms in renting GM cars. (CX 2220Z–74 - Belzberg; Reiter tr. 1798; CX 7777Z–20; CX 2105B)

3. General Competition

193. Budget competes with GM dealers in renting cars and with rental firms having only one location. (CX 2220Z–72–73 - Belzberg)

194. Quick Motors, Inc., a GM dealer in Watertown, New York, operated a Budget rental business as well as a leasing business as divisions of the dealership and competed with Hertz and Avis in renting cars, and to some extent with national firms like Hertz and Peterson, Heather & Howell, as well as other car dealers, including GM dealers, in leasing cars. (Quick tr. 1372, 1388–90)

195. Harris Pontiac, a GM dealer, operated a Budget rental franchise and a leasing business as divisions of the dealership. It competed to some extent with Hertz, Avis, National and all rental and leasing firms in the Wilmington, North Carolina area, including other GM dealers. (Avery CX 2219A-B, F; RX 1D, E)

196. Pershing Auto Leasing has had rental locations in south Florida serving Dade and Broward counties (which include Miami, Miami Beach, Ft. Lauderdale, Hollywood); Pershing has a rental location just outside Miami International Airport. (Nevel tr. 1044–45, 1046, 1054, 1078; CX 4508) It has about 800 cars for rental or lease, which are 90% GM. (Nevel tr. 1108) Pershing's most significant competitors in renting cars include Hertz, Avis, National, Budget, and Dollar Rent-A-Car; Pershing [41] also competes with Greyhound Rent-A-Car and General Rent-A-Car. (Nevel tr. 1056–57) Pershing's most significant competitors in leasing cars include GM dealer rental and leasing firms and Avis. (Nevel tr. 1057–58)

197. Trans Rent-A-Car, is a west coast rental car firm which had 900 cars in 1978, more than 50% of which were GM. Its major competitors in renting cars were Hertz, Avis, National, Budget, Dollar Rent-A-Car, and off-airport rental and leasing firms such as Thrifty Rent-A-Car, Econo-Car, American International Rent-A-Car, and others. (Furman tr. 1567, 1569, 1577)

198. I.R.A. Car Rental, an Ajax franchise since 1980, is located in

Minneapolis. About 75% of the cars in its fleet of 200 cars have been GM. (Kieffer tr. 2236, 2247) I.R.A.'s competitors in renting cars include Avis, National, Hertz, Budget, Thrifty Rent-A-Car, Econo-Car, and small independent rental and leasing firms. (Kieffer tr. 2247, 2250)

199. Sun Auto Rentals of Florida, Inc. had a fleet of about 530 cars in 1980, almost all of which were GM cars. (Korn tr. 2107) It competed with Hertz, National, Avis, Alamo, Greyhound and General Rent-A-Car. (Korn tr. 2115)

200. Ashbaugh Auto Rental of Houston, Texas rents about 300 cars, 80% of which are GM. (Ashbaugh tr. 840, 843). It competes with National, Hertz, Avis and Budget and others, including two GM dealers. (Ashbaugh 850, 856–57)

201. Ashbaugh Auto Rental's GM cars and the cars offered by its competitors, including National, are the same kind of cars. (Ashbaugh tr. 846, 850)

202. General Rent-A-Car has up to 7,000 cars in its fleet, with between 80 and 90 percent GM, and it competes with Alamo, Hertz, Avis, National, Greyhound, Budget, Pershing and Dollar. (Reiter tr. 1803–04, 1796–97)

203. In 1977, twenty of the largest rental and leasing firms all bought GM cars. (CX 7708)

204. Competing favored and disfavored rental and leasing firms purchase the same models of GM models for their fleets. (Uliano tr. 2425; Nevel tr. 1053–54, 1046–47: Quick tr. 1385; Reiter tr. 1806; CX 2220Z–105–06 - Belzberg; Ashbaugh tr. 846; Kieffer tr. 2256; Korn tr. 2109) [42]

4. Referrals

205. Rental and leasing firms refer customers to one another when they run out of rental cars. Hertz, Avis, National, and Budget (including licensees that are affiliated with GM dealers) make referrals to and receive referrals from each other as well as small, independent rental and leasing firms like Pershing and Sun Auto Rentals. (Nevel tr. 1059; Korn tr. 2118–19; Uliano tr. 2367; Quick tr. 1392–93)

5. GM Dealers

a. *Quick Motors, Inc.*

206. Quick Motors, Inc., a GM dealer, had a Budget rental franchise. It operated this franchise as a department of Quick Motors from the late 1960's to 1978. (Quick tr. 1370, 1372–73, 1406)

207. Quick Motors operated its leasing business as a department of the dealership from 1950 to 1978. (Quick tr. 1372–73, 1407)

208. Quick Motors purchased most of the GM cars in its Budget rental division from the Oldsmobile Division. Quick Motors purchased most of the GM cars in its leasing division from the Oldsmobile and Cadillac divisions of GM. (Quick tr. 1376–77, 1385)

209. Title to the cars in the Budget rental division of Quick Motors, Inc. was in the name of Quick Motors, Inc., d/b/a Budget Rent-A-Car of Watertown. Quick Motors, Inc., rather than its Budget division, owned and retained title to these cars. Title to the cars in its leasing division was in the name of Quick Motors, Inc. (Quick tr. 1375, 1434)

210. The new car sales department, the Budget rental division, and the leasing division of Quick Motors were all located at the same address. (Quick tr. 1375–76, 1403–04)

b. *Harris Pontiac, Inc.*

211. Harris Pontiac, a new car dealership, had a Budget rental franchise from 1967 to 1978. The franchise was a division of the dealership. Harris Pontiac also had a leasing division. (CX 2219A-C - Avery)

212. Harris Pontiac's rental and leasing fleet was made up of cars purchased from GM. GM cars were transferred from the dealership to its Budget division. Title to the cars in the [43] fleet of the Budget division was in the name of Harris Pontiac, Inc., d/b/a Budget Rent-A-Car of Wilmington. (RX 1D; CX 2219A-B, D - Avery)

213. At Harris Pontiac the dealership, the Budget franchise, and the leasing operation shared the same location. (CX 2219E - Avery)

J. *GM Advertising Payments Are Not Made Available*

214. GM has not informed the rental and leasing industry about the availability of advertising agreements from GM. (McClintock tr. 1159; CX 7780Z–26–27 - Vader; CX 7779Z–30–33)

215. GM responds only to requests from rental and leasing firms soliciting GM advertising agreements. GM has never offered advertising agreements to rental and leasing firms on its own initiative. (CX 7779Z–156–57 - Berg; McClintock tr. 1158–59; CX 7730B)

216. GM denied all requests from Sun Auto Rentals of Florida, Inc. for advertising agreements. (Korn tr. 2111–13)

217. GM denied all requests from Colonial Car Rental for advertising agreements. (Uliano tr. 2415–17)

218. GM denied all requests from Ashbaugh Auto Rental, Inc. for advertising agreements. (Ashbaugh tr. 858–61, 863–64)

219. GM denied a request from Pershing Auto Leasing, Inc. for an advertising agreement. (CX 4508; Nevel tr. 1078)

220. GM denied a request from I.R.A. Car Rental for an advertising agreement. (Kieffer tr. 2271–72, 2235, 2238)

221. GM denied a request from Fairway Rent-A-Car for an advertising agreement. (CX 7504S)

222. GM denied a request from Ajax Rent-A-Car for an advertising agreement (CX 811)

223. GM denied a request from Olin of New York, Inc. for an advertising agreement. (CX 1652A-C)

224. GM denied a request from Dollar Rent-A-Car Systems, Inc. for an advertising agreement. (CX 2704)

225. GM's Chevrolet Division denied Trans Rent-A-Car's requests for advertising agreements. (Furman tr. 1587–88, 1602; CX 5401–I) [44]

226. GM denied a request from U.S. Auto Leasing for an advertising agreement. (CX 5502C)

227. GM denied a request from Americar Rental System for an advertising agreement. (CX 7516A-E)

228. GM has admitted that (RAD-Supp. 60):

> During the period of October 1, 1971 through December 31, 1978, GM's payments for advertising under its agreements have not reflected an equal or proportional payment among all rental and leasing companies including those which compete against each other, based on the numbers of GM vehicles purchased by them. [45]

II. Analysis

This case involves millions of dollars in annual payments made by General Motors Corporation, the largest manufacturer of cars in the United States, to a few of the largest rental and leasing firms who agree to promote GM cars in their advertising. The impact of these payments on competition in the rental and leasing business is indicated by the amounts involved.[5] In 1978, for example, GM paid National Car Rental over $8 million in advertising allowances of $160 for each GM car purchased by National that year. (ff. 170–71) Many rental and leasing firms using GM cars and directly competing with National received nothing. (ff. 214–28)

I believe this arrangement violates the very purpose of Section 2(d) of the Robinson-Patman amendment to the Clayton Act. That statute is, however, technically complex and has been interpreted to require that the advertising payments be in connection with the resale of the product—a finding which cannot be made on this record. While all of the other technical elements of a Section 2(d) violation have been proved, Count I of the Complaint should therefore be dismissed.

Count II alleges these facts to be an unfair method of competition

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[There is no footnote 4.]

[5] Because of the stipulation of April 21, 1982, the record does not detail the competitive effects of the advertising agreements.

in violation of Section 5 of the FTC Act. The Supreme Court of the United States has held that this statute provides broad powers to the Federal Trade Commission to stop a trade practice which conflicts with the spirit of the Clayton Act even though it does not technically violate that law. Precedent and the preponderance of the evidence show that respondent General Motors has engaged in just such an unfair method of competition in violation of Section 5 and Count II must be sustained.

A. COUNT I

In Count I of the Complaint, alleging a violation of Section 2(d) of the Robinson-Patman amendment to the Clayton Act,[6] the parties have joined issue on two questions, namely: **[46]**

(1) whether rental and leasing firms are "customers" of GM; and
(2) whether they are engaged in the "distribution" of cars.

1. Rental and Leasing Firms As "Customers" of GM

GM sells new cars to franchised dealers. (f. 3) Many of these dealers have an additional business endeavor as a rental and leasing firm. (ff. 11, 29–41) In 1979, there were 578 GM dealers licensed by rental and leasing systems such as National, Budget and Avis. Many were receiving the benefit of payments by GM under advertising agreements with the system. (ff. 14, 30–32, 173, 181) About 500 GM dealers also receive the benefit of advertising payments from GM to Genway Corporation. (ff. 34–41)

Since these GM dealers are customers of GM, firms which compete with the GM dealers in renting and leasing GM cars are also "customers" of GM. That is the holding in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). There, a favored direct buying retailer was in competition with firms that bought the manufacturer's products through wholesalers, and the Court affirmed that for the purposes of Section 2(d) the firms buying through middlemen were "customers" of the manufacturer. Here, GM dealers with affiliated rental and leasing businesses buy directly from GM and compete with other rental and leasing firms buying cars from "middlemen" GM dealers. (ff. 183–84. 191–96, 200, 205–13) Those rental and leasing firms buying through middlemen also become, therefore, "customers" of GM for purposes of Section 2(d).

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[6] Section 2(d) of the Robinson-Patman amendment to the Clayton Act, provides, 15 U.S.C. 13(d):

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furthermore, some rental and leasing firms are customers of GM through the indirect purchaser doctrine. *American News Co.* [47] *v. FTC*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962).[7] GM has sufficient contacts with rental and leasing firms and sufficient influence over the price and terms upon which they buy GM cars for the doctrine to apply.

GM directs advertising at, solicits, and recognizes rental and leasing firms as customers. (ff. 53–54, 56, 62) GM contacts rental and leasing firms directly about low prices compared to competing cars (ff. 53–54), price incentives, such as free air-conditioners and options at a reduced price (ff. 47–48, 72, 76), and cash bonuses (ff. 50, 55, 64–66, 71), as well as direct offers of price protection and assurances. (ff. 22–24, 62–63) GM's factory invoice price substantially controls the price paid by rental and leasing firms to dealers. (ff. 19–21, 53, 59–61) GM sales personnel contact rental and leasing firms directly as well as with dealers, and discuss prices and solicit orders. (ff. 42–56, 70) GM sometimes delivers cars directly to the rental and leasing firms (f. 73), and authorizes those firms to do their own new car and warranty servicing. (f. 80)

Thus, the degree of control exercised by GM over fleet sales to rental and leasing firms is sufficient to make those firms customers of GM within the meaning of the Clayton Act. *Whitaker Cable Corp.*, 51 F.T.C. 958, 972–73 (1955), *aff'd*, 239 F.2d 253 (7th Cir. 1956). GM recognizes rental and leasing firms as customers by soliciting them, dealing directly with them in promoting sales, and exercising control over the terms upon which they buy. *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537, 546 (1937).

2. "Distribution" of Rental and Leasing Cars

Complaint counsel argue that rental and leasing firms "sell" cars because: (1) the firms are engaged in reselling cars on a time sharing basis, and (2) after the term of use in the rental or leasing fleet, the cars are resold by the firms. They also argue that, even if the firms do not sell cars, they "handle" cars within the meaning of the Act. Respondent argues, on the other hand, that rental and leasing firms do not compete in the [48] distribution of cars because Section 2(d) is only directed at discriminatory advertising allowances granted in connection with the resale of products, and that rental and leasing firms do not resell cars but are engaged in a service business.

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[7] The indirect purchaser doctrine even applies where the direct purchaser is disfavored and the indirect purchaser benefits from the discrimination. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 644, 647–48 (1969). Here, many disfavored GM dealers who are in the rental and leasing business buy direct from GM and compete with favored rental and leasing firms who are indirect purchasers. (ff. 183, 192–96, 200–01, 205–13)

a. *"Competing in the Distribution" Means Selling*

Complaint counsel argue that "distribution" as used in Section 2(d) means more than activity involved in selling and includes renting and leasing cars. While "distribution" is not defined in the statute or legislative history, I believe that the meaning of the word is limited to acts involved in the sale of commodities.

Judicial reading of the statute unanimously supports a holding that a Section 2(d) violation must involve the sale of a product.[8] In *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), the Court held that "the competition with which Congress was concerned in Section 2(d) was that between buyers who competed in *resales* of the supplier's products." (Emphasis added.) 390 U.S. at 356. In *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975), the court stated: "Section 2(d) . . . refers to payments in connection with the resale by the buyer of the goods . . . ." In *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973) the court stated: ". . . [S]ections 2(d) and 2(e) focus on resale."[9] And, the [49] Commission recently stated that Section 2(d) requires the payment to bear "a nexus to the resale or preparation for resale." *Herbert R. Gibson, Sr.*, 95 F.T.C. 553, 725 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 103 Sup.Ct. 1521 (1983).[10]

b. *Time-sharing*

Complaint counsel argue that car rental and leasing firms sell cars on a time sharing basis. For comparison they point to the photocopier business where photocopy machines are distributed by leasing. (CSC brief 55–56) This same argument—that leases of photocopy machines are subject to the Robinson-Patman Act—was rejected in *SCM Corp. v. Xerox Corp.*, 394 F.Supp. 384 (D. Conn. 1975). Furthermore, the court coincidentally relied in part on an analogy to automobile rentals, 394 F.Supp. at 385:

> [T]he person who rents a car and pays by the miles driven could be said to have purchased a quantity of transportation . . . . [Plaintiff] does not claim Robinson-Patman

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[8] The commentators agree that Section 2(d) is directed at resales. "The product that is the subject of the promotional favoritism must have been bought with the intention of resale." Kintner, *A Robinson-Patman Primer* at 235 (1970). "[Section 2(d) applies] to discrimination in allowances or services only between competing resellers of the supplier's goods." Austin, *Price Discrimination* at 124 (1959). "Although the semantic vagueness of the statutory terms of 'services or facilities,' coupled with the stricter sanctions available under Sections 2(d) and 2(e), invites strained interpretations by FTC or private plaintiffs, the legislative purpose and governing judicial rulings confine these provisions to cooperative promotional arrangements between the supplier and customer *in connection* with the customer's *resale* of the particular product." Rowe, *Price Discrimination under the Robinson-Patman Act* at 376 (1962). (Emphasis in original.)

[9] *See also, Lang's Bowlarama, Inc. v. AMF, Inc.*, 1974–2 Trade Cas. (CCH) ¶ 75,158 (D.R.I. 1974); *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499, 500 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

[10] In *Clairol, Inc.*, 69 F.T.C. 1009, 1047 n. 13 (1966), 410 F.2d 647, 648 (9th Cir. 1969), the Commission held that there was a resale and refused to address the question whether "distribution" in Section 2(d) requires that "there must necessarily be a 'resale' in all cases." The statement in *Gibson*, however, shows that, while "distribution" may not require an actual sale, the commercial transaction involved must be part of the resale process.

coverage of all such cost-per-usage leases, apparently recognizing that examples such as those given do not involve a "commodity" within the meaning of the Act, even if they could be thought to involve a purchase.

c. *Used Cars*

Complaint counsel also argue that rental and leasing firms in fact sell cars since they resell the cars after using them in the rental or leasing fleet. Rental and leasing firms, however, do not resell new cars. (f. 132) They use cars in their business, and, after these assets accumulate mileage and suffer wear and tear, they are sold as used cars which are commodities of a different quality. (ff. 129–39) [50]

d. *"Handling" Is Part of "Sale"*

Complaint counsel argue that even if they do not sell cars, rental and leasing firms are "handling" cars and are therefore engaged in distribution within the meaning of Section 2(d). While the legislative history does not provide a definition, the term "handling" in the commercial sense is part of the business of selling such as the physical act of grading, packaging, storing or transporting goods.[11] That "handling" is part of, and was not meant to be different from, "sale" as used in the statute is indicated by the interpretation of "processing" as used in the statute. "Processing" is used in both Section 2(d) and Section 2(e) of the Act and is defined in *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 744 (1945) to be a mode of treatment of materials to be changed as part of the distribution process to a different state preparatory to resale of the commodity. The Court stated that the "statute is aimed at discrimination . . . in all cases *where the commodity is to be resold*, whether in its original form or in a processed product." (Emphasis added.) Similarly, "handling" should be defined to mean the act of physically dealing with the commodity in connection with the resale, and since rental and leasing firms do not resell new cars, they do not "handle" or "compete in the distribution" of cars within the meaning of Section 2(d).

e. *Furnishing Services*

GM pays promotional allowances to a few "favored" rental and leasing firms pursuant to advertising agreements.[12] If these [51] rental and leasing firms are engaged in the furnishing of a service, rather than the resale of products, Count I must be dismissed because the Robinson-Patman Act does not apply to discriminatory allowances paid to purchasers who use the product in furnishing a service, *The Times Mirror Co.*, 92 F.T.C. 230, 231 (1978):

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[11] "Handling" was defined in *Clairol, Inc.* (initial decision adopted as the decision of the Commission), (69 F.T.C. 1009, 1031 (1966) (dicta):

> "Handling" is defined in Black's Law Dictionary (4th ed. 1951) as meaning ". . . to control, direct, to deal with, to act upon, to perform some function with regard to or to have passed through one's hands, to buy and sell or to deal or trade in" . . . .

The definition of "handle" found in Webster's International Dictionary (2d ed. 1934) includes: "to have pass through one's hands; to buy and sell; to deal, or trade in; as, they handle only fruit."

[12] GM does not make payments on a proportional basis, even among favored rental and leasing firms, so some of them are more favored than others. (f. 171)

> It is clear that the Robinson-Patman Act applies only if a challenged price discrimination involves the sale of commodities. Price discrimination in noncommodity transactions, such as the furnishing of services, is not actionable under the statute.

The test for deciding whether a business involves the sale of a commodity or the furnishing of a service is found in the *Times Mirror* case. There, the Commission held that newspaper advertising was a "commodity"—and not a service—within the meaning of Section 2(a) of the Robinson-Patman Act.[13] It is not necessary to apply that test here, however, because the Commission specifically declared that the Act was not intended to reach transactions of a purely service nature such as discriminatory bus transportation rates.[14] Although a bus company, as different from car rental and leasing firms, retains possession of the vehicle while rendering the transportation service, the businesses seem to be sufficiently similar to encourage a finding that car rental and leasing firms [52] are engaged in the sale of a service, or at least to discourage a finding that they are in the business of reselling commodities.

f. *A Lease Is Not A Sale*

That Section 2(d) does not apply to the business of rental and leasing firms is buttressed by *Lang's Bowlarama, Inc. v. AMF, Inc.*, 1974-2 Trade Cases (CCH) ¶ 75,158 (D.R.I. 1974). There, a bowling lane operator sued AMF, Inc., his supplier of bowling equipment (*e.g.*, lanes, balls, pin setters), alleging that AMF's sponsoring of a tournament at a competing bowling lane violated Section 2(d) of the Robinson-Patman Act. The court dismissed the complaint, holding that Section 2(d) protects only customers competing in the resale of a product, and that the operation of a bowling lane was more in the nature of a lease and was not covered by the Act. The business of car rental and leasing firms, involving long or short term leases, is clearly analogous to the bowling lane operator's business and therefore does not involve the resale of cars. (ff. 89–143)

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[13] The Commission's test set out in that decision involves determining: (1) "the dominant or essential nature of the transaction"; (2) whether the product sold is "sufficiently fungible in nature to be susceptible to the kind of non-discriminatory pricing which the legislative scheme seems to encourage"; and (3) whether there is anything inherent in the transaction that "requires the particularized skills or treatment for different customers." (92 F.T.C. at 233-34)

The record here indicates that many services are furnished by car rental and leasing firms. (ff. 89-94) Using the *Times Mirror* test, however, would seem to indicate that they are not primarily in the business of furnishing services. Nor are they resellers. They are in fact in the business of leasing cars, for long or short term, and, like most firms dealing with the public, they also render services.

[14] The Commission adopted, 92 F.T.C. at 233, the holding of *Fleetway, Inc. v. Public Service Interstate Transportation Co.*, 72 F.2d 761 (3rd Cir. 1934).

g. *Rental and Leasing Firms Consume Cars*

Another way of looking at the question is to determine who actually consumes the product—here, automobiles. If they are consumed by each customer of the rental and leasing firm, the transaction would involve a resale. If the rental and leasing firm consumes the cars in their business, however, it does not.

This was the approach in *Clairol Inc. v. FTC*, 410 F.2d 647 (9th Cir. 1969), where the court upheld the Commission's finding that beauty salon operators had resold hair dye, and that Section 2(d) of the Robinson-Patman Act therefore applied to discriminatory advertising allowances paid by Clairol to favored beauty salons. The court's reasoning centered on the question of who consumed the product. The court noted, 410 F.2d at 648:

> . . . [T]he product is not consumed by the salon in performing or equipping itself to perform such a service. The service rather is individualized and the product is used directly on the customer herself. The products are not used in bulk but in individualized packages such as would be secured in a drugstore sale.

Here, by contrast, the rental and leasing firms consume the cars in their fleets. (ff. 121–39) The customer who rents the car does not use up the product. Instead, the car must be returned at the end of the rental period and then it is rented [53] again. (ff. 140–43)[15] Fleets purchase cars for use in their own business and not for resale.[16] *Merit Motors, Inc. v. Chrysler Corp.*, 417 F.Supp. 263, 271 (D.D.C. 1976), *aff'd*, 1977-2 Trade Cas. ¶ 61,772 (D.C. Cir. 1977):

> Commercial fleets buy cars to use as capital assets in their businesses and the fact that they dispose of them just as any business disposes of its depreciated capital assets does not, in any way, put them in the automobile business.

B. COUNT II

Count II of the Complaint alleges that GM's advertising payments to rental and leasing firms is an unfair method of competition in violation of Section 5 of the FTC Act. The Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clay-

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[15] Leased cars, which may be used by the customer for a relatively longer period than rental cars (ff. 122–24), come closer to the holding of the *Clairol* case, but are still an asset consumed by the leasing firm. (ff. 121–39)

[16] The proof that rental and leasing firms sometimes resell new cars is *de minimis*.

ton Acts even though such practices may not actually violate those laws. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463 (1941).

Section 2(d) applies only to promotional allowances granted by the seller. The use of Section 5 has been upheld where the Commission proceeded against the buyer for inducement of the allowances. *R.H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964); *Giant Food Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963). The omission of buyers from the coverage of Section 2(d) was held to be more inadvertent than studious. *Grand Union Co. v. FTC*, 300 F.2d 92, 98 (2d Cir. 1962) Similarly, in this case GM's practice of paying advertising allowances to only a few large rental and leasing firms while refusing to provide the allowances to smaller competitors violates the basic policy of Section 2(d), and failure of that statute to cover payments made in connection [54] with the rental and leasing business seems more inadvertent than studious.[17]

1. Basic Policy of the Robinson-Patman Act

The basic policy of the Robinson-Patman amendment to the Clayton Act is found in its statutory language and legislative history. The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960). And the legislative history of the Act shows that promotional allowances "become unjust when [the favored buyer] is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitors, unable to command such allowances, cannot do so." H.R. Rep. 74th Cong., 2d Sess. 15–16 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936). In passing Section 2(d), Congress intended "to assure that all sellers, regardless of size, competing directly for the same customers would receive even-handed treatment from their suppliers." *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 356 (1968).

2. The Facts

GM started making advertising payments because it realized in 1968 that it was losing sales of thousands of cars, with the concomitant loss of exposure and demonstration value. (f. 178) The rental and leasing firms which have been able to obtain advertising agreements with GM are generally large, national firms (ff. 151–55, 178, 202), which are thus able to shift to GM a substantial portion of their advertising expenditures (ff. 171–74), while smaller competitors are unable to command such allowances. (ff. 216–28)

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[17] Congress obviously intended to exclude the furnishing of services from the coverage of the Robinson-Patman Act because of the difficulty of determining the "like grade and quality" of a service—for example, the furnishing of economic or legal advice. The rental or leasing of a product, on the other hand, does not present this difficulty.

Although rental and leasing firms may vary in size, rates, customers, services rendered and marketing direction (ff. 94–116), there is general competition among such firms using GM cars.[18] They compete with comparative price advertising for [55] GM cars. (ff. 182–85). Off-airport firms compete successfully with those having locations on the airport premises. (ff. 186–92) Local firms compete with those having a national franchise. (ff. 193–204) GM dealers engaged in renting and leasing cars compete with other rental and leasing firms. (ff. 183–84, 192–96, 200, 205) And when they run out of rental cars, firms refer customers to one another. Hertz, Avis, National, Budget, and GM dealers licensed by these firms, make referrals to and receive referrals from each other as well as small, independent rental and leasing firms. (f. 205)

Pursuant to its advertising agreements, in 1978 GM favored 15 rental and leasing firms or systems. (f. 174)[19] However, GM does not make proportionally equal advertising payments. (f. 228) Among the favored firms some were more favored than others. National Car Rental System received about $160 per GM car purchased during 1976–1978, while other favored customers received less, ranging down to $6 or $7 per car. (f. 171) GM has not made advertising payments available to all competing customers (ff. 214–15), and has denied requests for advertising agreements from some of its customers. (ff. 216–27)

The facts in this case show a violation of the basic policy of Section 2(d) of the Robinson-Patman Act.

3. Case Law Under Section 5

As found above, GM's discriminatory advertising payments technically do not violate Section 2(d) of the Robinson-Patman Act because rental and leasing firms do not compete in the resale of cars. Those payments do, however, violate the central policy of the statute as shown in the legislative history. Section 5 of the FTC Act was passed precisely to apply to such technical deficiencies.

In *Brown Shoe*, the shoe company had franchise agreements with some 650 show stores whereby, in return for merchandising aid, the stores agreed not to deal in shoes made by other manufacturers. The Supreme Court upheld a finding that this agreement conflicted with central policy of Section 3 of the Clayton Act against competitively injurious exclusive dealing contracts made in connection with the sale of a commodity. There was no technical violation of Section 3, however, because [56] the exclusive dealing contract was in connection with the furnishing of services which is not covered by that statute. Yet, the Court upheld the use of Section 5 to avoid this technical deficiency.[20]

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[18] *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 248 (1959).

[19] GM payments to rental systems are of direct benefit to the franchised licensees of those systems who are essential to the transaction. (ff. 41, 173) *Suanee Paper Corp. v. FTC*, 291 F.2d 833, 836 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962); *Herbert R. Gibson, Sr.*, 95 F.T.C. at 728–29.

Furthermore, even if there were no stipulation eliminating the need for competitive injury in this case, Count II could be upheld on the incipiency theory. In *Brown*, the respondent contended that the Commission had no power to declare the franchise program unfair without proof that its effect "may be to substantially lessen competition or tend to create a monopoly" which would have to be proved if the Commission had proceeded under Section 3 of the Clayton Act rather than Section 5 of the FTC Act. The Supreme Court stated, 384 U.S. at 322: "We reject the argument that proof of this Section 3 element must be made for as we pointed out above our cases hold that the Commission has the power under Section 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws." Moreover, where the central policy of a *per se* statute has been violated, but that statute is unenforceable because of some technical deficiency, a Section 5 violation clearly will occur without proof of competitive injury. *Perpetual Federal Savings & Loan Ass'n.*, 90 F.T.C. 608, 657 (1977), *vacated on other grounds*, 94 F.T.C. 401 (1979): "Where Section 5 is employed to adapt the policy of a *per se* statute, the *per se* standard remains applicable."[21] [57]

III. CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding.

2. The Federal Trade Commission has jurisdiction over GM.

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[20] That a discriminatory practice is in connection with the lease of a product rather than a resale is not an impediment to a Section 5 case. The use of Section 5 was upheld to prohibit discriminatory rates in leases in *Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964), *modified and enforced sub nom., La Peyre v. FTC*, 366 F.2d 117 (5th Cir. 1966). There a monopolist charged a higher rate for leases of shrimp peeling machines used on the West Coast than those used on the Gulf Coast.

[21] Respondent GM argues that its business decision of which rental and leasing firms to buy advertising from should not be disturbed, and that it has the right to choose its suppliers of advertising under *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); and *General Motors Corp.* (crash parts), 99 F.T.C. 464, 580–81 (1982).

The business reason for the allegedly unfair practice is not relevant to a *per se* theory of violation. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65–68, 70–71 (1959). Moreover, the cases cited are not applicable. *Colgate* and *General Motors* (crash parts) deal with the suppliers' right to select customers, not the duty of a supplier to deal with established customers on non-discriminatory terms. *OAG* involved the monopolist's right to discriminate among established customers (630 F.2d at 922; 95 F.T.C. at 41, 75 n. 34), but the Commission has declined to follow that decision, *General Motors* (crash parts), 99 F.T.C. at 580 n. 45.

3. GM is engaged in interstate commerce as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act.

4. GM has paid for advertising furnished by selected rental and leasing customers in connection with their business.

5. The advertising has not been furnished, however, in connection with the handling or resale of cars sold by GM, and rental and leasing firms do not compete in the distribution of cars.

6. Rental and leasing firms compete in renting and leasing cars.

7. GM has not made or offered to make payments for advertising available on proportionally equal terms to all of its other rental and leasing customers competing with the favored rental and leasing customers.

8. Count I must be dismissed.

9. GM's acts and practices as charged in Count II of the Complaint, and as hereinabove found, are in violation of the policy of Section 2(d) of the Robinson-Patman Act and of Section 5 of the Federal Trade Commission Act.

10. GM has failed to sustain its burden of proof upon the various defenses that it pled and presented herein. [58]

IV. Remedy

GM grants advertising allowances to only a few rental and leasing firms, and even to those favored few on a disproportionate basis. To remedy this violation of Section 5 of the Federal Trade Commission Act, and of the policy of Section 2(d) of the Robinson-Patman Act, an order is needed directing respondent to cease and desist from granting any advertising allowances unless they are made available on proportionally equal terms to all competing rental and leasing firms. This is the remedy traditionally employed by the Commission in cases brought under Section 2(d). *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1048 (1960), *aff'd*, 301 F.2d 499 (D.C. Cir. 1961).

The Order requires GM to comply with the law. If respondent continues to grant advertising allowances to rental and leasing firms, it must do so proportionally. Respondent can satisfy this requirement by granting allowances on a per vehicle basis.[22]

The Order also requires respondent to advertise the existence of its advertising allowance program once a year for five years to the rental and leasing industry through two of the five publications in which it has advertised its cars. (*E.g.*, CX 7507, CX 7511.)

Finally, the Order requires respondent for a reasonable period to keep and produce a record of any termination, nonrenewal or refusal to enter any advertising allowance program with a rental and leasing firm. This requirement is within the Commission's discretion to cope with unlawful practices. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946).

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[22] Chrysler Corporation grants advertising allowances based on the number of Chrysler cars purchased by the rental and leasing firms. (Uliano tr. 2468-69).

ORDER

For purposes of this Order, the term *respondent* refers to General Motors Corporation, its successors and assigns, and its officers, directors, agents, representatives, and employees. The term *vehicle* refers to an automobile or a truck. The term *rental and leasing firm* refers to any firm engaging in offering to rent, renting, offering to lease, or leasing vehicles to the public in the United States. [59]

It is ordered, That respondent, directly or indirectly through any corporation, subsidiary, division, or other device, in connection with the offering for sale, sale, or distribution of vehicles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

Paying or contracting to pay to or for the benefit of any rental and leasing firm anything of value as compensation or in consideration for advertising, promotion, or any other services or facilities furnished by or through such rental and leasing firms in connection with the offering to rent, renting, offering to lease, or leasing of vehicles, unless such payment or consideration is available on proportionally equal terms to all other competing rental and leasing firms.

It is further ordered, That respondent may provide for termination or nonrenewal of joint advertising programs for cause. Such cause may include, for example, false or deceptive advertising or claims for payments, advertising which, or in media which, reflect negatively on respondent, its products or its goodwill or failure to maintain reasonable standards of automobile maintenance, safety or cleanliness. Respondent may decline to enter into a joint advertising program where it reasonably appears such affiliation would negatively reflect on respondent, its products or its goodwill, but the decision will be based on standards consistent for all rental and leasing firms and GM shall maintain a written record of the specific basis for such decision for two years which shall be made available to the Commission upon request following reasonable notice.

It is further ordered, That respondent shall forthwith distribute a copy of this Order to cease and desist to all officers and directors of respondent and to each of respondent's operating divisions that is engaged in the sale of respondent's vehicles within the United States.

It is further ordered, That respondent shall advertise nationally in at least two of the following publications annually for a period of five years the existence and availability of any advertising or promotional program offered to rental and leasing firms in compliance with the terms of this Order: *Automotive Fleet* magazine, *The Vehicle* (the annual membership directory of American Automotive Leasing Association, American Car Rental Association, Truck Renting and Leasing Association, and Alliance of State Car and Truck Renting and [60] Leasing Associations), *Time* magazine, *Newsweek* magazine, or *Business Week* magazine.

It is further ordered, That respondent shall within sixty (60) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this Order.

OPINION OF THE COMMISSION

BY CALVANI, *Commissioner:*

I. INTRODUCTION

A. *Background*

By Complaint issued on July 19, 1978, Respondent General Motors Corporation (hereinafter "GMC") is charged with violation of Section 2(d) of the Robinson-Patman Act, 15 U.S.C. 13(d), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1980). GMC sells automobiles and trucks to dealers which, in turn, sell vehicles to rental and leasing companies. Some GMC dealers also operate rental and leasing fleets. The Complaint alleges that GMC paid some rental and leasing companies for advertising furnished by those companies, *e.g.,* "We Feature General Motors Cars." The Complaint further alleges that GMC has not made such payments available on proportionally equal terms to all competing rental and leasing companies.

In order to expedite this litigation, the parties entered into a stipulation on April 21, 1982. Under the stipulation, "Complaint counsel abandoned any claim that GM's acts and practices in issue caused any injury to competition." Initial Decision ("I.D."), p. 2. Having stipulated away the issue of competitive injury, Complaint Counsel placed *exclusive* reliance on a finding of *per se* liability. Specifically, Complaint Counsel relied on two theories of violation: First, GMC had [2] violated Section 2(d) of the Robinson-Patman Act, thereby violating Section 5 of the Federal Trade Commission Act, (Count I). Second, GMC's acts violated the "spirit" of Section 2(d) and thereby violated Section 5 of the Federal Trade Commission Act (Count II). Complaint Counsel's second theory of the case is thus predicated on the so-called "spirit" or "gap filler" doctrine.

Following the denial of Complaint Counsel's motion for summary decision on October 4, 1982, trial commenced the following day before Administrative Law Judge James P. Timony. Complaint Counsel called thirteen witnesses; GMC called three. Additional testimony was received from four other Commission witnesses by deposition, affidavit, and interrogatories. The Record included 3,177 transcript pages and 485 exhibits. Trial concluded on November 15, 1982.

The evidence produced at trial indicated that GMC made millions of dollars in annual payments to a few of the largest rental and leasing firms that agreed to promote GMC cars in their advertising. Many rental and leasing firms using GMC cars, however, received nothing, and GMC denied a number of requests for advertising agreements. I.D., pp. 43, 45.

Judge Timony dismissed Count I, finding that Complaint Counsel had failed to establish that the advertising payments were made in connection with the resale of the product—a requisite element of a Section 2(d) case. The evidence indicated that, although the rental and leasing companies eventually resold [3] their automobiles, this was done to dispose of worn inventory for reasonable value and not as a primary business activity.

However, Judge Timony found that GMC's arrangement for making selective advertising payments "violates the very purpose of Section 2(d) of the Robinson-Patman Act." I.D., p. 45. Invoking the so-called "gap filler theory," he found GMC to have violated Section 5 of the Federal Trade Commission Act.

B. *The Issues Presented For Review*

Two questions are presented for review. First, Complaint Counsel assigns error to Judge Timony's conclusion that GMC's purchase of advertising from some car rental and leasing companies was not the grant of discriminatory advertising allowances in violation of Section 2(d). The Commission agrees with Judge Timony, eschewing the opportunity to expand the case law beyond its present contours, and affirms his decision with respect to Count I. Second, respondent GMC assigns error to Judge Timony's conclusion that the grant of a discriminatory allowance, not properly cognizable under Section 2(d) of the Robinson-Patman Act, 15 U.S.C. 13(d) (1980), may nevertheless violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1980), under the "spirit" or "gap-filler theory." The Commission declines this opportunity to expand the law and reverses the decision below as to Count II. [4]

Before undertaking an analysis of these issues, a brief introduction to the relevant statute is appropriate. An understanding of the protectionist purposes and effects of the Act provides guidance where, as here, the Commission is asked to expand its literal reach beyond that established by Congress—especially in light of the Commission's public interest mandate.

C. *Purpose of the Robinson-Patman Act*

Prior to World War I a three-tiered channel of distribution, *i.e.*, manufacturer-wholesaler-retailer, characterized the sale of most consumer goods. After the War the distribution of these products underwent significant change in many industries. One of the factors precipitating this change was the emergence and rapid growth of multi-location vendors, *i.e.*, "the chain store." Between 1926 and 1933 the chain store segment of total retail sales increased from 9% to 25%. J. Palamountain, *The Politics of Distribution* 7 (1955). By 1929, 29% of grocery industry sales had been captured by chain stores. B. Zorn & G. Feldman, *Business Under the New Price Laws: A Study of the Economic and Legal Problems Arising Out of the Robinson-Patman Act and the Various Fair Trade and Unfair Practices Laws* 20 (1937).

While the success of the chain stores was due to a myriad of factors, their direct purchasing procedures and the exercise of their combined purchasing power were important. The success of the chain stores posed a direct threat to competing independent single unit establishments and—perhaps more [5] importantly—to their suppliers. In 1928, the National Association of Retail Grocers lobbied the Congress to investigate the legality of chain store purchasing practices. That same year, a Senate resolution directed the Federal Trade Commission to study the subject. In December 1934, the Commission submitted its Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935) (hereinafter the "Final Report"), to the Senate. Quite surprisingly, at least to the independents and their suppliers, the Commission found that a significant proportion of the difference between chain and independent retail purchasing prices was associated with more efficient operations rather than the abuse of buying power. The Final Report concluded that the difference in purchasing prices was only 1%. J. Palamountain, *supra*, at 65, *citing* FTC, Chain Stores; Special Discounts and Allowances to Chain and

Independent Distrib.; Grocery Trade, 73d Cong., 2d Sess., S. Doc. No. 89 (1934). Interestingly, there is some evidence that these efficiencies were still grossly underestimated. *See* Adelman, "Price Discrimination as Treated in the Attorney's General Report," 104 *U. Pa. L. Rev.* 222, 232 (1955).

Section 2 of the Clayton Act, as originally enacted, contained proscriptions against price discrimination. The case law, however, had rendered these provisions impotent in the view of many. In *Mennen Co. v. FTC,* 288 F. 774 (2d Cir.), *cert. denied,* 262 U.S. 759 (1923), and *National Biscuit Co. v. FTC,* 299 F. 733 (2d Cir.), *cert. denied,* 266 U.S. 613 (1924), the Second Circuit held that Section 2, as originally enacted, did not apply [6] to secondary-line sales. It was not until the Supreme Court's decision in *George Van Camp & Sons v American Can Co.,* 278 U.S. 245 (1929), that it was finally established that the provisions of Section 2 applied to secondary-line discrimination. Although interpretations limiting the application of Section 2 were reversed in the *Van Camp* decision, the years preceding *Van Camp* were critical years when chain stores enjoyed extensive growth. *See ABA* Antitrust Section, Monograph No. 3, *The Robinson-Patman Act: Policy and Law* 12 (1980). A further limitation was subsequently engrafted onto the Act. Following *Van Camp,* the Commission instituted proceedings in *Goodyear Tire & Rubber Co.,* 22 F.T.C. 232 (1936). The respondent ultimately prevailed when the Sixth Circuit held that the statute unconditionally exempted price discrimination made on account of differences in quantities sold. *Goodyear Tire & Rubber Co. v. FTC,* 101 F.2d 620 (6th Cir.), *cert. denied,* 308 U.S. 557 (1939). Thus, the law, as originally enacted and interpreted by the Court of Appeals, would immunize *any* quantity discount without regard to cost justification.

Those who believed their interests hurt by the growth of chain stores adopted courses of conduct to stem that tide. Many independent single unit merchants, with the assistance of their wholesale suppliers, organized boycotts of manufacturers who sold directly to chain stores. Other independents formed cooperatives in an effort to achieve scale economies and to exert buyer power. A third defensive strategy sought state legislation to impose discriminatory taxes, sometimes predicated on the number [7] of units within a particular state, on chain stores. Indeed, by 1939, some twenty-seven states had passed such legislation. *See* J. Palamountain, *supra* at 162. Interestingly, the United States Supreme Court sustained that legislation on several occasions. *See, e.g., Louis K. Liggett Co. v. Lee,* 288 U.S. 517 (1933).

When voluntary modes of resistance and state tax legislation failed to discourage the growth of the chains, independents and their suppliers turned to Congress. Codes of Fair Competition, promulgated pursuant to the National Industrial Recovery Act of 1933, 48 Stat. 195 (1933), mandated that manufacturers abide by a minimum wholesale discount in some industries and forbade discriminatory sales in others. The Codes sought to preserve traditional patterns of distribution which had been threatened by competition. In 1935, however, the Supreme Court held NIRA unconstitutional as an impermissible delegation of legislative powers in *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). The independents and their suppliers went back to the proverbial drawing boards.

The United States Wholesale Grocers Association, through their associate counsel, C. B. Teegarden, drafted the original bill of what was to become the Robinson-Patman Act. Representative Wright Patman introduced the bill as H.R. 8442 some fifteen days after the *Schechter* decision. *See* H.R. 8442, 74th Cong., 1st Sess. (1935). [8]

The course of the bill through Congress well illustrates the protectionist, non-efficiency oriented nature of the legislation. *See generally* Dept. of Justice, Report on the Robinson-Patman Act 101–139 (1975) (hereinafter "DOJ Report"). Huey Long's observation that "he would rather have thieves and gangsters than chain stores in Louisiana" is representative of the views of many policy makers. *Cf.* Fulda, "Food Distribution in the United States, the Struggle Between Independents and Chains," 99 *U. Pa. L. Rev.* 1051 (1951). Others said the same thing: "I believe the chain store should not only be curbed, but . . . should be eliminated . . ." 80 Cong. Rec. 8136 (1936) (Remarks of Rep. Moritz). *See also* DOJ Report 104–108. The bill was enacted and subsequently signed into law by President Roosevelt on June 19, 1936.

It is quite clear that the underlying predicate of the Robinson-Patman Act was *not* consumer welfare. Rather, the Act was protectionist legislation. The legislative history and subsequent scholarship overwhelmingly support this conclusion. *See, e.g.,* DOJ Report; R. Posner, *The Robinson-Patman Act* (1976). Interestingly, the Supreme Court has recently explicitly recognized the protectionist purpose of the law. *See Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories,* 103 S. Ct. 1011, 1023 n.39 (1983). As with most protectionist legislation, it comes at a cost to the American consumer. [9]

Moreover, although the original intent of Congress in enacting the Robinson-Patman Act may have been to help small business, historically the brunt of the Commission's enforcement efforts has fallen on small businesses. For instance, of the 564 companies named in FTC Robinson-Patman complaints between 1961 and 1974, only 36, or 6.4%, had annual sales of 100 million dollars or more at the time of complaint. F. Scherer, *Industrial Market Structure and Economic Performance* 581 (2 ed. 1980). Professor Scherer further observes that when large companies were sued, their greater incentive and financial resources allowed them to resist FTC prosecution efforts more vigorously and with greater success. Roughly 90% of respondents with sales of less than 10 million dollars accepted consent decrees, whereas only 37% of the 100 million dollar companies did the same. Twenty-three of the companies with sales exceeding 100 million dollars ultimately succeeded in having their complaints dismissed, whereas none of the smaller companies were able to do likewise. F. Scherer, *supra.*

The Commission's prosecution of group buying ventures also illustrates this point. Most of the cases focused on cooperatives in the food, auto parts, and toy industries. In the main, these respondents were small companies that banded together to benefit from scale economies and other efficiencies associated with larger purchases. *See generally* Mezines, "Group Buying—When Is It Permitted Under the Robinson-Patman Act?" 44 *N.Y.U.L. Rev.* 729 (1969). *See also* Statement of F. M. Scherer Before the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and [10] Related Matters of the Committee on Small Business 5 (January 26, 1976).

That is not to say that passage and maintenance of the Act was, or is, ill advised. Congress can—and, indeed, does—opt to protect by subsidy or regulation certain special interests at a cost to the public. Care must be taken, however, that the Commission and the courts, to whom the Act's interpretation and enforcement have been entrusted, not expand the ambit of legislation beyond that set forth by Congress. The United States Supreme Court has recently admonished that Congress has mandated competition to be "the heart of our national economic policy." *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978). *See also United States v. U.S. Gypsum Co.,* 438 U.S. 422 (1978). Accordingly, the Commission will eschew efforts to broaden application of the Robinson-Patman Act beyond that established by law.

II. SECTION 2(d): THE ALLOWANCES SECTION

In 1935, the Final Report concluded that one way in which chains garnered special treatment from their suppliers was the receipt of unearned advertising allowances. In enacting the Robinson-Patman Act, Congress sought to prohibit indirect price discrimination through discriminatory advertising allowances. Section 2(d) specifically provides:

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the [11] course of such commerce as compensation or in consideration for any services

> or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any product or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

15 U.S.C. 13(d) (1980). This Section differs from the price discrimination proscription of Section 2(a) in two noteworthy ways. First, the cost justification defense contained within Section 2(a) is not available. Secondly, the presence or absence of competitive injury is irrelevant in a Section 2(d) case. In a series of cases, the United States Supreme Court has held that "neither absence of competitive injury nor the presence of 'cost justification' defeats enforcement of the provisions of Section 2(e) of the Act." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 58–59 (1959). *See also Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962). Thus, Section 2(d) employs a *per se* standard of illegality.[1]

It is axiomatic that Section 2(d) is limited in application to discriminatory advertising allowances granted in connection with the *resale* of products. *See FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 356 (1968); *Rutledge v. Electric Hose & Rubber Co.*, 511 [12] F.2d 668, 678 (9th Cir. 1975); *Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); *Herbert R. Gibson, Sr.*, 95 F.T.C. 553, 725 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1521 (1983). *Cf. Clairol, Inc.*, 69 F.T.C. 1009, 1047 n. 13 (1966), *aff'd*, 410 F.2d 647, 648 (9th Cir. 1969). The commentators agree. ABA Antitrust Section, Monograph No. 4, *The Robinson Patman Act: Policy and Law Vol. II* 53 (1983). *See* E. Kintner, *A Robinson-Patman Primer* 235 (1970); C. Austin, *Price Discrimination* 124 (1959); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 376 (1962).

Complaint Counsel first confronts the "resale requirement" by urging us to abandon it. Counsel relies on the statutory language "processing, handling, sale, or offering for sale" in arguing that subsuming "processing," "handling," and "offering" within the word "sale" would render the others surplus. Thus, proof of *either* handling *or* resale ought satisfy the statutory requirement. Complaint Counsel cites authority for the proposition that disjunctive language in a statute demonstrates a legislative intent to establish distinct categories. However, we decline to embrace Complaint Counsel's theory.

While Complaint Counsel's proffered statutory interpretation has some initial appeal, *see Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the language of Section 2(d) is not susceptible to more precise definition. The word "handle" may properly include everything from "to touch" to "have within its jurisdiction." *Webster's Third New International Dictionary* 1027 (1961). [13] Obviously, abrogating the well-established "resale requirement" by focusing on the word "handling" would render the terms "sale, or offering for sale" meaningless. More importantly, the "resale test" provides a relatively clear demarcation of what is within and without the statutory ambit. For these reasons it is well established that a discriminatory allowance must be made in connection with the *resale* of the product in order to be actionable under Section 2(e). This Commission has recently held that "the payment . . . must be in connection with the 'processing, . . . *i.e.*, it must bear a nexus to the resale or preparation for resale by the retailer.' " *Herbert R. Gibson, Sr.*, 95 F.T.C. 553, 725 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1521 (1983), citing *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975). *See also FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 356 (1968); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 546 (9th Cir. 1983); *Kirby v. P. R. Mallory & Co. Inc.*, 489 F.2d 904, 909 (7th Cir. 1983), *cert. denied*, 417 U.S. 911 (1974); *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1328 (6th Cir. 1983); *Glowacki v. Borden Inc.*, 420 F.Supp. 348, 358 (N.D.Ill. 1976); *General Foods Corp.*, 52 F.T.C. 798, 814–15 (1956); *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581, 602 (1951); *New England Confectionery* [14] *Co.*, 46 F.T.C. 1041, 1059 (1949). Accordingly, we decline the invitation to extend the proscription of Section 2(d).[2]

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[1] The legislative history of Sections 2(d) and (e), however, makes clear that Congress intended these sections to have "relatively narrow scope"; thus Courts "have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a)." *Herbert R. Gibson Sr.*, 95 F.T.C. 553, 726 (1980), *aff'd* 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1521 (1983).

The question then becomes whether the discriminatory advertising allowances before us were made in the context of a resale of automobiles by the recipients of the allowances. Complaint Counsel urges an imaginative theory upon which the Commission might find the requisite resale nexus, suggesting that the piecemeal resale of cars by the rental and leasing agencies satisfies the "resale test." In support of its argument Complaint Counsel relies on the Commission's decision in *Clairol, Inc.*, 69 F.T.C. 1009 (1966), *order modified on other grounds*, 410 F.2d 647 (9th Cir. 1969). There the Commission held that the dispensing of hair dyes by beauty salons was a resale within the meaning of Section 2(d) of the statute. Complaint Counsel relies on other similar cases. *See, e.g., Standard Oil Co. v. FTC*, 340 U.S. 231, 235–36 (1951) (gasoline purchased in tank-car and tank-wagon quantities by retailers for piecemeal resale to the public by the gallon and fraction thereof); *FTC v. Morton Salt Co.*, 334 U.S. 37, 41, 49 (1948)

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[2] It should be noted that Section 2(e) specifically refers to "commodities bought for *resale*." Although the text of Section 2(d) differs from that of Section 2(e), the courts have consistently held that the two sections must be construed *in pari materia*. *See Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1327–28 (6th Cir. 1983).

(salt purchased by the carload or by the case by chain store retailers for piecemeal resale to the public by the individual package); *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 743–45 (1945) (dextrose purchased by the pound by a candy manufacturer for piecemeal resale in candy bars); [15] *Hampton v. Graff Vending Co.*, 478 F.2d 527, 530–31 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973) (gum balls sold to vending machine operators by the case and resold to the public one by one through vending machines); *National Dairy Products Corp. v. FTC*, 412 F.2d 605, 608–9 (7th Cir. 1969) (fruit spreads purchased by the case by retailers for piecemeal resale to the public by the jar); *Guyott Co. v. Texaco, Inc.*, 261 F.Supp. 942, 946, 951 (D.Conn. 1966) (paving asphalt purchased by the ton for piecemeal resale as an ingredient of a different product); *Curtiss Candy Co.*, 44 F.T.C. 237, 260–61 (1947) (candy sold to vending machine operators by the carton and resold to the public by the bar through vending machines), *order modified on other grounds*, 48 F.T.C. 161 (1951); *Sherwin-Williams Co.*, 36 F.T.C. 25, 50 (1943) (paint purchased by the carload, truckload, or gallon by dealers for piecemeal resale to occasional consumers buying the paint "in very small quantities").

Judge Timony rejected this argument below as we do here. The cases cited by Complaint Counsel in support of its theory are true piecemeal distribution cases. The instant case is not. There is no allegation that the leasing companies, qua leasing companies, simply purchase cars in bulk and then immediately resell them. Yet, that is the gist of the "piecemeal" [16] distribution cases cited above. While rental and leasing firms do resell cars after using them in their fleets, the resold cars are commodities of a different quality. These cars, having accumulated mileage and suffered wear and tear, are qualitatively different from the vehicles originally purchased. Were Complaint Counsel's argument to be accepted, then any dealer who resells a commodity used in its business after the conclusion of its useful life would satisfy the resale requirement of the Act.

Rather clearly, the allowance in question is *not* made for the purpose of discriminatorily aiding the recipient in the resale of the product. Accordingly, Complaint Counsel has failed to satisfy "the resale test." In *Herbert R. Gibson, Sr.*, 95 F.T.C. 553 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1521 (1983), we observed that Section 2(d) of the Robinson Patman Act ought not be expansively construed and noted that most courts have "resisted expanding the 'scope of Sections 2(d) and 2(e) beyond the limited area of applicability intended by Congress.'" *Herbert R. Gibson Sr., supra* at 727, *quoting Cecil Corley Motor Co. v. General Motors Corp.*, 380 F.Supp. 819, 850 (M.D.Tenn. 1974). For reasons set forth above, we hold that Judge Timony correctly dismissed Count I.

III. SECTION 5: THE SPIRIT THEORY

Complaint Counsel argues that even if the Commission were to find no Robinson-Patman violation for reasons set forth above, the conduct in question may violate Section 5 of the Federal [17] Trade Commission Act. Counsel urges that conduct that violates the "spirit," *though not "letter" of the Robinson-Patman Act,* is actionable under the so-called "spirit" theory of Section 5. True, Section 5 of the Federal Trade Commission Act has been held to apply to conduct that violates the policy or "spirit" of the antitrust laws, even though it may not come technically within its terms. *See generally* Averitt, "The Meaning of 'Unfair Methods of Competition' in Section 5 of the Federal Commission Act," 21 *B.C.L. Rev.* 227, 251, 271 (1980). *See also FTC v. Brown Shoe Co.,* 384 U.S. 316, 321 (1966); *FTC v. Motion Picture Advertising Service Co.,* 344 U.S. 392, 394 (1953); *Fashion Originators' Guild v. FTC,* 312 U.S. 457, 463 (1941).

Previous cases presenting allowance issues, otherwise cognizable under Section 2(d) of the Robinson-Patman Act, have been fertile ground for application of the "spirit" theory. Several courts have held that a *buyer* may be prosecuted under Section 5 for *inducing* a seller to grant him discriminatory promotional allowances notwithstanding the fact that the statutory language of the Robinson-Patman Act only prohibits a *seller* from *granting* discriminatory promotional allowances. *See Alterman Foods, Inc. v. FTC,* 497 F.2d 993 (5th Cir. 1974); *Colonial Stores, Inc. v. FTC,* 450 F.2d 733 (5th Cir. 1971); *Fred Meyer, Inc. v. FTC,* 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968); *R. H. Macy & Co. v. FTC,* 326 F.2d 445 (2d Cir. 1964); *Giant Food Inc. v. FTC,* 307 F.2d 184 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 910 (1963); *Grand Union Co. v. FTC,* 300 F.2d 92 (2d Cir. 1962); *American News Co. v. FTC,* 300 [18] F.2d 104 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962) These decisions have been predicated on the "spirit theory" of Section 5, with Courts concluding that the omission of buyer liability was "inadvertent rather than studious." *Grand Union, supra,* at 96. Does then the grant of discriminatory allowances under these facts violate the "spirit," if not the letter, of the Robinson-Patman Act? This presents an issue of first impression.

Judge Timony found that the grant of advertising allowances by GMC "violates the very purpose of Section 2(d) of the Robinson-Patman Act" and therefore found liability under Section 5. I.D. 45. The most recent Commission and judicial opinions on the scope of Section 5 do not support such an expansive approach to *per se* liability. In *Ethyl Corp.,* 101 F.T.C. 425 (1983), *rev'd on other grounds, sub. nom. DuPont v. FTC,* 729 F.2d 128 (2d Cir. 1984), the Commission noted that Section 5 may extend *beyond* the limitations of the Clayton Act only "when there is good evidence that the challenged practices have anticompetitive effects very similar to those prohibited by [that Act] and when prohibiting such practices is not inconsistent with any other legislative goal of the antitrust laws." Thus, the Commission has applied Section 5 to activities that violate the spirit of certain Sherman and Clayton Act sections that were clearly intended to promote competition and deter anticompetitive acts. However, the legislative history of Section 2(d) discussed above, makes clear that unlike the Sherman and Clayton Acts, the underlying goal of the Robinson-Patman Act is the protection of competitors, not competition. Accordingly, the "spirit" theory [19] must be applied with great caution in the context of cases brought under that Act.

While the "spirit" theory, as embraced by the courts, may provide a useful technique in some cases, we decline to apply it in cases such as this *where there has been no demonstration of an anticompetitive impact*, and there is no underlying Section 2(d) violation. While Section 2(d) of the Act itself may not require proof of an anticompetitive impact, we hold today that this *per se* quality ought be limited to the Robinson-Patman Act and not extended beyond established case law.[3] [20]

Accordingly, for reasons set forth above we affirm Judge Timony's dismissal of Count I and reverse his finding of liability on Count II.[4] An Order Dismissing the Complaint is to [21] be issued accordingly.[5]

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[3] In a series of buyer-inducement cases brought pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, challenging the receipt of discriminatory allowances and services, the Commission has held that the *per se* quality of Sections 2(d) and 2(e) of the Robinson-Patman Act applies as well to Section 5 inducement cases. *See Alterman Foods, Inc. v. FTC*, 497 F.2d 993 (5th Cir. 1974); *Colonial Stores, Inc. v. FTC*, 450 F.2d 733 (5th Cir. 1971); *R. H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir.1964); *Giant Food Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962); *American News Co. v. FTC*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962). In four of these cases, the courts addressed the Commission's position that injury need not be proved. Each decision sustained the *per se* characterization of a Section 5 buyer's inducement violation. *Grand Union, supra* at 99–100; *Giant Food, supra* at 186; *R. H. Macy & Co., supra* at 450; *Alterman Foods, supra* at 1000.

Several of these courts explained why the *per se* character of a Section 2(d) violation should be carried over to a Section 5 buyer's inducement violation. The explanation was fleshed out in most detail in *Grand Union*, where the court said

> . . . Section 2(d) defines an offense which is illegal *per se*. There is no reason why this rule should not apply to the buyer as well as to the seller. Congress has made no such distinction; § 2(f), being the corollary of § 2(a), requires proof of injury to competition in cases brought against buyers, while § 2(c) applies a *per se* rule to buyers as well as sellers. Since § 5 is here utilized to reach an integral part of a violation of § 2(d), and the rationale of the proceeding is to fulfill the policies of that prohibition, it would seem an unwarranted amendment of the legislative scheme to apply a different standard on the question of competitive effects to the buyer than it applies to the seller. In making some, but not all, of the practices outlawed by the Robinson-Patman Act illegal *per se* Congress indicated that those selected for *per se* treatment always led to the undesired effects on competition. 300 F.2d at 99 (citations omitted).

The strong language of the *Grand Union* court suggested that it would be inappropriate for the Commission to require proof of injury in a Section 5 buyer inducement case. To the extent that a Section 2(d) violation for granting a discriminatory promotional allowance is a *per se* violation, the court indicated, a Section 5 violation for inducing that allowance *should* also be a *per se* violation. *See also Giant Food, supra* at 186. *Cf. Perpetual Federal Savings and Loan Ass'n*, 90 F.T.C. 608, 657 (1977) (citing *Grand Union* for the proposition that "where Section 5 is employed to adopt the policy of a *per se* statute, the *per se* standard remains applicable"). We decline to extend this rationale to the instant case.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

Most fundamentally, the majority's opinion is an exercise in lawmaking in the guise of law interpretation. On the grounds that Congress did not have "consumer welfare" in mind when it passed the Robinson-Patman Act, the majority has decided to reject every applicable legal precedent in order to construe the Act as narrowly as possible and avoid finding liability. The practical result is that the majority has substituted its own understanding of "consumer welfare" for the version that previous court opinions and Congress have expressed.

The key legal issue in the Commission's decision to dismiss the complaint is whether the prohibition on the type of discriminatory promotional allowances examined here is subject to a *per se* or rule of reason analysis if it is addressed under the FTC Act rather than the Robinson-Patman Act.[1] The majority cannot quite bring itself to concede that discriminatory promotional allowances are *per se* unlawful if analyzed under the [2] Robinson-Patman Act, though the law is quite clear that the *per se* standard applies.[2] Furthermore, long series of court opinions have held that when the Commission is analyzing conduct closely analogous to practices prohibited as *per se* by the Robinson-Patman Act, the *per se* standard should apply under Section 5 analysis as well.[3]

As the Second Circuit Court of Appeals explained in *Grand Union*:[4]

> [S]ection 2(d) defines an offense which is illegal *per se*. There is no reason why this rule

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[4] Since the parties stipulated the absence of a necessary element of Complaint Counsel's case, we have considered remanding this case to Judge Timony to determine whether the requisite competitive impact is present. We conclude that remand is inappropriate. First, it may well be that Complaint Counsel has concluded such evidence does not exist or could not be developed at trial. Second, having entered into a stipulation it seems unfair to now force Respondent *in this case* to face yet another trial on a different theory of the case. However, the Commission cannot sacrifice its obligation to a competitive economy because of hardship to a particular litigant. This Commissioner would be receptive to the issuance of a new complaint against Respondent if the practice continues and *if* injury to competition could be demonstrated.

[5] As stated at the outset, GMC sells its automobiles to its franchised dealers which, in turn, resell to rental and leasing companies. We do not today address the matters of whether the rental and leasing companies may be "customers" of GMC within the meaning of Section 2(d) or whether Section 5 of the Federal Trade Commission Act may be employed to police Robinson-Patman Act-type problems in a rental and leasing context, where competitive injury is present.

[1] I agree with the Commission's decision that the highly technical requirements of the Robinson-Patman Act are not met here because promotional allowances from automobile manufacturers for car leasing firms are not provided "in connection with the processing, handling, sale or offering for sale" as provided in Section 2(d) of the Act.

[2] *See* the qualified language in the majority opinion at pp. 18–19. In fact, the *per se* standard under Section 2(d) is well established. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Alterman Foods, Inc. v. FTC*, 497 F.2d 993 (5th Cir. 1974); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

[3] *See* the cases cited at p. 16, fn. 2 of the Majority Opinion.

[4] *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

> should not apply to the buyer as well as to the seller. . . . Since § 5 is here utilized to reach an integral part of a violation of § 2(d), and the rationale of the proceeding is to fulfill the policies of that prohibition, it would seem an unwarranted amendment of the legislative scheme to apply a different standard on the question of competitive effects to the buyer than it applies to the seller. 300 F.2d at 99 (citations omitted)

Not surprisingly, in view of the unanimity of the prior opinions on this point, complaint counsel and respondent dispensed with the issue of competitive impact and did not submit proof on it. Nevertheless, the majority now concludes that a *per se* theory is not appropriate. The reader will find little [3] explanation for this departure from precedent other than an extensive recitation of the line of cases that it is abandoning and an attempt to rely on the Commission's decision in *Ethyl Corp.*[5] In *Ethyl*, a rule of reason case, the Commission stated that the FTC Act prohibits conduct which does not violate the Sherman Act and Clayton Act "when there is good evidence that the challenged practices have anticompetitive effects very similar to those prohibited by those two Acts and when prohibiting such practices are not inconsistent with any other legislative goal of the antitrust laws."[6] The majority would like to read this language to mean all conduct analyzed under Section 5 that does not technically violate the Clayton Act or Sherman Act should be subject to a rule of reason analysis, even if the conduct is closely analogous to conduct which is prohibited under a *per se* standard under the Clayton or Sherman Acts.

If the Commission in *Ethyl* had wanted to abandon prior precedent on this point, it would have said so. It did not. In fact, it is clear that Congress or the courts may decide that some types of conduct are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are illegal *per se.*"[7] As the court of appeals put it in *Grand Union:* "In making some, but not all, of [4] the practices outlawed by the Robinson-Patman Act illegal *per se* Congress indicated that those selected for *per se* treatment always led to the undesired effects on competition."[8] Consequently, it is perfectly appropriate for the Commission to dispense with proof of anticompetitive effects when Congress determined that the closely analogous practices under the Clayton Act are *per se* unlawful.

Does the majority believe that the competitive effects of the discriminatory allowances at issue here are different from the effects of the conduct prohibited as *per se* unlawful by Section 2(d)? Apparently, since the majority opinion does not identify a single reason why the effect might be different. Indeed, I suspect that the majority would prefer not to find the practices prohibited by Section 2(d) unlawful either, without an economic analysis of competitive effects. It is perfectly proper to hold that opinion and to try to counsel Congress to change the law. But it is not acceptable to legalize conduct on the ground that Congress is "protectionist" rather than concerned about "consumer welfare," and that the Commission's judgment about what is best for the public interest can be substituted for a Congressional policy.

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[5] *Ethyl Corp.*, 101 F.T.C. 425 (1983), *rev'd*, —F.2d (2d Cir. 1984).

[6] 101 F.T.C. at 597.

[7] *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 692 (1978).

[8] 300 F.2d at 99.

Finally, one might reasonably ask—if the parties and the ALJ applied an improper legal standard, particularly when the standard announced by the majority is an abandonment of prior precedent, shouldn't the case be remanded? The majority rejects [5] the alternative of remanding, in part because "having entered into a stipulation it seems unfair to now force respondent *in this case* to face yet another trial on a different theory of this case." (Majority Op. at 20, fn. 4; emphasis in original) The stipulation, entered into by GM and complaint counsel provided: "Injury to competition is not a prerequisite to finding a violation under complaint counsel's [Section 2(d) and Section 5 theories] and "GM agrees . . . that complaint counsel's Section 5 *per se* theory reflects an accepted principle of law under prior decisions of the Commission." The stipulation further stated: "neither the effects on competition nor the lack of effects on competition of the GM acts and practices covered by the complaint are in issue in this case" and "evidence regarding the competitive effects . . . is irrelevant and inadmissible."[9] Despite the stipulation, GM felt content to argue in its brief that its practices are procompetitive.[10] When a party stipulates that a case should be tried on a particular, established legal theory and avoids an adverse result because the reviewing body adopts a different legal theory, I fail to see any possible unfairness in a retrial based on the newly announced standard.

STATEMENT OF COMMISSIONER PATRICIA P. BAILEY CONCURRING IN PART AND DISSENTING IN PART

I agree with the majority that the Robinson-Patman count in this complaint should be dismissed. However, I do so on the narrow ground that the Robinson-Patman Act is a highly technical, specific statute which is not subject in this instance to the creative reading urged by complaint counsel. It is precisely because of the rigid nature of the statute that, in the past, it has been necessary to call upon Section 5 of the Federal Trade Commission Act to "fill the gaps". *See, e.g.,*

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[9] *See* ¶¶ 2-4, 5, 6 of the Stipulation adopted as part of the pretrial order of April 29, 1982.

[10] *See, e.g.,* GM's appeal brief, 6, 19, 20, 41-42.

Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962). However, granting that the statute was not drafted with much interpretive latitude is not to presume that Congress intended it to be construed narrowly because of Congressional concern that the Act was protectionist or anticonsumer. That, I take it, is the majority's position (Slip op. at 10); my reading of the legislative history is otherwise.

It is quite clear that the drafters of the Robinson-Patman Act perceived no conflict between consumer welfare and the even-handed treatment of business which the statute mandates. For example, in introducing the bill to the House, sponsor Representative Patman said: "This bill is designed to accomplish what so far the Clayton Act had only weakly attempted, namely, to protect the independent merchant, *the public whom he serves*, and the manufacturer from whom he buys, from exploitation by his [2] chain competitor." (79 Cong. Rec. 9078 (1935) (emphasis added)). The Report of the House Committee on the Judiciary concludes in most emphatic terms:

> There is nothing in [the recommended bill] to penalize, shackle or discourage efficiency, or to reward inefficiency.
>
> * * * * * * *
>
> It is not believed that the restoration of equality of opportunity in business will increase prices to consumers. Unfair trade practices and monopolistic methods which in the end destroy competition, restrain trade, and create monopoly have never in all history resulted in benefit to the public interest. On the contrary, for the most part, they have been symbolic of lower wages, longer hours, lower prices paid producers, coercion of independent manufacturers, domination of that field of industry, and in the end high prices to the consumers and large profits to the owners. H.R. No. 2287, Pt. 1, 74th Cong., 2d Sess. 17 (1936).

I am aware that these Congressional assumptions about the Act's consumer benefits have been severely criticized by economists, lawyers, certain business groups and even government task forces. However, the statute has survived virtually unchanged for nearly half a century now, so I must presume that the original intent is unaltered when making my decision to enforce the law. I am certainly uncomfortable with discovering, at this late date, that Congress meant its clearly expressed policy to be supplanted by whatever views of consumer welfare are currently in vogue.

As to the Section 5 count of the Complaint, I would remand, not dismiss. Whether the Commission uses the gap-filling powers [3] of Section 5 in a *per se* or rule of reason mode is discretionary with the Commission, turning upon both the facts of the case and the nature of the touchstone law. In this matter, the Commission's complaint may have intended to specify the rule of reason approach. In Paragraph 9 of the complaint the Commission arguably imposed upon itself the burden of demonstrating that the challenged acts and practices had "the tendency and effect of preventing and hindering competition." Complaint counsel exceeded their authority in stipulating away this provision without informing the Commission. Such a significant change in the focus of any case should be accomplished by certification to the Commission for approval, under Commission Rule of Practice 3.15.

I would restore the Complaint to its original form (Section 5 count only) and remand for trial on the issue of competitive effects.

FINAL ORDER

This matter has been heard by the Commission upon the appeals of complaint counsel and respondent General Motors Corporation from the Initial Decision and upon briefs and oral argument in support of, and in opposition to, the respective appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm the Initial Decision regarding dismissal of Count I of the Complaint and to reverse, insofar as the Decision failed to dismiss the remaining Count II, and found liability under that Count. Accordingly, the appeal of respondent General Motors Corporation is granted and the appeal of Complaint Counsel is denied, and [2]

It is ordered, That the complaint is dismissed in its entirety.

Commissioner Pertschuk dissented. Commissioner Bailey concurred in part and dissented in part.

In the Matter of

PILKINGTON BROTHERS P.L.C.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3136. Complaint, June 22, 1984—Decision June 22, 1984

This consent order requires a British corporation, among other things, to divest within five years, its shares in Ford Glass Limited (FGL) to either Ford Motor Company or another Commission-approved buyer. Respondent must remove any director, alternate director or representative also serving on the board of FGL or Vitro Plan S.A., its Canadian and Mexican joint venture partners engaged in the manufacture of float glass. Although the order permits the firm to discuss the technical aspects of float glass production with its partners, discussions concerning competitive issues are prohibited. The company is further required to waive most of its rights under the Pilkington-Ford Motor Co. Unanimous Shareholder Agreement; vote its Vitro Plan shares in favor of any proposal to increase the Mexican firm's production of float glass; and refrain from invoking a provision of a 1965 agreement barring Mexican investors from producing float glass independently of the joint venture. Additionally, the company is prohibited from acquiring any concern engaged in the production of float glass in North America without prior Commission approval, for a period of ten years.

Appearances

For the Commission: *Robert W. Doyle, Jr.*

For the respondent: *Miles W. Kirkpatrick, Morgan, Lewis & Bockius,* Washington, D.C.

Complaint

The Federal Trade Commission, having reason to believe that the acquisition by Pilkington Brothers P.L.C. (PB) of 30 percent of the outstanding voting securities of Libbey-Owens-Ford Company (LOF) violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINTIONS

1. For the purpose of this complaint the following definitions shall apply:

(a) *Respondent* means PB, and its subsidiaries, divisions, affiliates, successors and assigns;

(b) *Flat glass* is a generic term for all glass produced in flat form and later cut or shaped into various products; and

(c) *Float glass,* in either clear or tinted form, is unprocessed flat glass manufactured by floating molten glass over a bed of molten material or materials.

II. PILKINGTON BROTHERS P.L.C.

2. PB is a corporation organized and existing under the laws of England, with its principal place of business located at Prescot Road, St. Helens, Merseyside, England. PB is engaged in the manufacture and sale of float glass, float glass products, and other glass products.

3. PB owns 49 percent of Ford Glass Limited, a Canadian float glass manufacturer. Ford Motor Company owns the remaining 51 percent of Ford Glass Limited.

4. PB owns 35 percent of Vitro Plan S.A., a Mexican corporation which owns Mexican operations engaged in the manufacture and sale of float glass, float glass products, or other glass products.

III. LIBBEY-OWENS FORD COMPANY

5. LOF is a corporation organized and existing under the laws of the State of Ohio with its principal place of business located at 811 Madison Avenue, P.O. Box 799, Toledo, Ohio. LOF is engaged in the manufacture and sale of float glass, float glass products, fluid power system components, and laminated and molded plastic products.

IV. JURISIDICTION

6. At all times relevant herein, PB has been engaged in and affected "commerce" as that term is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE ACQUISITION

7. Subject to an outstanding escrow agreement which expired on April 30, 1983, on or about December 31, 1982, PB acquired 30 percent of the outstanding voting securities of LOF.

VI. TRADE AND COMMERCE

8. The relevant market is the manufacture or sale of float glass in North America (the United States, Mexico, and Canada).

9. Both PB and LOF are substantial competitors in the relevant market.

10. Concentration in the relevant market is high.

11. Barriers to entry in the relevant market are substantial.

VII. EFFECTS OF THE ACQUISITION

12. The effect of the acquisition may be to substantially lessen competition in the United States in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) Substantial actual and potential competition between PB and LOF in the relevant market will be eliminated;

(b) Substantial actual and potential competition between LOF and other companies in the relevant market will be eliminated;

(c) LOF will be eliminated as a substantial independent technological innovator and competitor; and

(d) The already high levels of concentration in the relevant market will be significantly increased.

VIII. VIOLATIONS CHARGED

13. The acquisition constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission and Clayton Acts; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Pilkington Brothers is a corporation organized, existing and doing business under and by virtue of the laws of England, with its offices and principal place of business located at Prescot Road, St. Helens, Merseyside, England.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for the purposes of this order, the following definitions shall apply:

1. *Pilkington* means Pilkington Brothers P.L.C., a corporation organized, existing and doing business under the laws of England, with its principal offices at Prescot Road, St. Helens, Merseyside, England, its officers, employees, agents, representatives, parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Pilkington's parents, divisions, subsidiaries, successors, and assigns.

2. *FGL* means Ford Glass Limited, a corporation organized, existing and doing business under the laws of Canada, with its principal offices at 101 Richmond Street West, Toronto, Ontario, Canada, its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of FGL's parents, divisions, subsidiaries, affiliates, successors and assigns.

3. *Vitro Plan* means Vitro Plan S.A., a corporation organized, existing and doing business under the laws of Mexico, with its principal offices in Monterrey, Nuevo Leon, Mexico, its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns,

and the officers, employees or agents of Vitro Plan's parents, divisions, subsidiaries, affiliates, successors and assigns.

4. *LOF* means Libbey-Owens-Ford Company, a corporation organized, existing and doing business under the laws of Ohio, with its principal offices at 811 Madison Avenue, Toledo, Ohio, its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of LOF's parents, divisions, subsidiaries, affiliates, successors and assigns.

5. *Flat glass* is a generic term for all glass produced in flat form and later cut or shaped into various products.

6. *Float glass,* in either clear or tinted form, is unprocessed flat glass manufactured by floating molten glass over a bed of molten material or materials.

7. The *relevant geographic market* is the United States, Canada and Mexico.

II.

It is further ordered, That Pilkington, within five (5) years from the date of service of this order, shall divest its shares in FGL to one or more acquirers which shall be subject to the prior approval of the Federal Trade Commission, *provided, however,* that the divestiture of the shares to Ford Motor Company, or a subsidiary thereof, shall not require the prior approval of the Federal Trade Commission.

III.

It is further ordered, That Pilkington, within thirty (30) days from the date of service of this order, shall remove its directors, alternate directors, or any other representatives from the Boards of Directors of FGL and Vitro Plan and shall not thereafter have representatives of any kind on the Boards of FGL or Vitro Plan without the prior approval of the Federal Trade Commission.

IV.

It is further ordered, That Pilkington shall waive all rights under the Unanimous Shareholders Agreement between Pilkington and Ford Motor Company, dated July 29, 1981, except rights provided by Paragraph 5 of said Agreement, *provided, however,* (1) that such waiver shall not affect the rights provided by said Unanimous Shareholders Agreement to any acquirer or acquirers of Pilkington's shares in FGL, and (2) that if FGL seeks to make any major change, except as may be required by applicable law, in the pension or retirement plans of FGL, including the principal methods of funding those plans, Pilkington may oppose any such change.

V.

It is further ordered, That if the Series "A" shares of Vitro Plan are voted in favor of (1) any proposal to increase Vitro Plan's production capacity, production operating rates, or sales of float glass in the relevant geographic market, or (2) any proposal necessary to implement a proposed increase in Vitro Plan's production capacity, production operating rates, or sales of float glass in the relevant geographic market, then Pilkington shall vote its Series "B" shares in favor of such proposals.

VI.

It is further ordered, That Pilkington, at all ordinary and extraordinary general shareholders' meetings of Vitro Plan and FGL, shall exclude itself from all discussions or communications regarding any issues of a competitive nature, including but not limited to, issues relating to float glass capacity expansions or restrictions, production operating rates, production costs or any other costs, pricing, sales, marketing, market projections or forecasts, and further that Pilkington, including a proprietary examiner as defined in Article 42 of the Estatutos Sociales of Vitro Plan, S.A., dated March 2, 1981, shall be prohibited from discussing, communicating or expressing its opinion, in any way, with any other shareholders, directors, or officials of Vitro Plan or FGL regarding these issues at any other time, either prior to or subsequent to the aforesaid meetings, *provided, however,* that nothing in this paragraph shall prohibit discussions or communications between Pilkington and Vitro Plan or FGL regarding technical support relating to Vitro Plan's or FGL's production of flat glass (including float glass) or flat glass products, *provided further,* that nothing in this paragraph shall prohibit discussions or communications between Pilkington and Ford Motor Company on matters not related to FGL.

VII.

It is further ordered, That Pilkington shall, for a period of ten (10) years after the effective date of this order:

1. Maintain complete files and records of all correspondence and other communications, whether in the United States or elsewhere,

between Pilkington and Vitro Plan and between Pilkington and FGL, other than in providing technical support to Vitro Plan's or FGL's production of flat glass (including float glass) or flat glass products.

2. Maintain logs of all meetings and nonwritten communications, other than in providing technical support to Vitro Plan's or FGL's production of flat glass (including float glass) or flat glass products, whether in the United States or elsewhere, between Pilkington and Vitro Plan and between Pilkington and FGL, including in such logs the names and corporate positions of all participants, the dates and locations of the meetings or other communications and a summary or description of the matters discussed in each such meeting or other communications.

3. Retain and make available to the Federal Trade Commission on request the complete files, records and logs required by subparagraphs 1 and 2.

4. Submit annually to the Federal Trade Commission a detailed sworn statement setting forth the manner and form in which Pilkington has complied with Paragraphs VI and VII of this order.

Provided, however, That nothing in this Paragraph VII shall require Pilkington to maintain files, records or logs of any communications with Ford Motor Company on matters not related to FGL or to report the same to the Federal Trade Commission.

VIII.

It is further ordered, That Pilkington shall not vote its shares in Vitro Plan to amend or in any way alter the Estatutos Sociales of Vitro Plan, S.A., dated March 2, 1981, without the prior approval of the Federal Trade Commission.

IX.

It is further ordered, That Pilkington shall not invoke the provisions of Article VIII of the Agreement between Pilkington and Fomento de Industria y Comercio S.A., dated March 29, 1965, so as to prevent Vitro S.A. from engaging in the manufacture of float glass in Mexico through companies other than Vitro Plan.

X.

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten (10) years from and after the date of service of this order, Pilkington shall cease and desist from acquiring, without prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any interest in, or the whole or any part of the stock, or share capital of any company engaged in the production of float glass in the relevant geographic market, or assets used in the production of float glass of any company which is now or has previously been engaged in the production of float glass in the relevant geographic market, *provided, however,* that such prior approval of the Federal Trade Commission is not required for (1) further acquisition of stock of LOF, or (2) further acquisition of the capital stock of Vitro Plan, *provided, however,* such further acquisition does not increase Pilkington's holdings in Vitro Plan above 35%.

XI.

It is further ordered, That Pilkington shall, within sixty (60) days from the date of service of this order, and annually thereafter until the tenth anniversary thereof, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with the terms of this order, and such additional information relating thereto as may from time to time reasonably be required.

XII.

It is further ordered, That Pilkington shall, within sixty (60) days from the date of service of this order, and every one hundred and twenty (120) days thereafter until it has fully complied with Paragraph II of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with the terms of Paragraph II of this order and such additional information relating thereto as may from time to time reasonably be required.

XIII.

It is further ordered, That Pilkington shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in itself, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation, which may affect compliance obligations arising out of this order.

XIV.

It is further ordered, That Pilkington shall use its best efforts to obtain promptly any approval by the Canadian government, or any subdivision thereof, that is necessary to its compliance with this order.

It is further ordered, That Pillsbury shall use its best efforts to obtain promptly any approval by the Canadian government or any subdivision thereof, that is necessary to its compliance with this order.

Due to insufficient information supplied by respondent SCM Corporation, Commission was unable to determine whether proposed interlocking directorate would violate provisions of Final Order entered against SCM. (92 F.T.C. 416 (1978)) [*Kraftco Corporation, et al., Dkt. 9035*]

June 18, 1984

Dear Mr. Willis:

This is in response to your request for advice as to whether Dr. Richard R. West may serve simultaneously on the boards of directors of SCM Corporation ("SCM") and Bohemia, Inc. ("Bohemia") without violating the prohibition against interlocking directorates contained in the Commission's order in Docket No. 9035 ("the order") [92 F.T.C. 416 (1978)]. This request was made on behalf of SCM, which became subject to the Commission's order on October 6, 1980 [14 C.D. 23 (612 F.2d 707 (1980), *cert. denied,* 449 U.S. 821 (1980)].

According to your request, Dr. West is presently a member of the SCM board and would like to rejoin the Bohemia board, provided that his simultaneous service on the two boards would not violate the order. Your request involves a product overlap that occurs between SCM's subsidiary, Allied Paper, Incorporated ("Allied") and Bohemia; however, there is no direct product overlap between the two parent companies, SCM and Bohemia. You advise that Dr. West is not a director of Allied and that he is not involved with Allied's operating policies.

Your request states that Allied owns and operates a lumber mill in Jackson, Alabama which sells lumber products, primarily to customers in the Southeast, under the "M.W. Smith Lumber Company" ("M.W. Smith") trade name. For the fiscal year ended June 30, 1982, the total sales of Allied and its subsidiaries were $288 million including $6.9 million total sales of all forms of lumber. You state that Bohemia and M.W. Smith both sell lumber products in 18 states. The total annual sales of lumber products in the 18 states is $5.2 million for Bohemia and $4.1 million for M.W. Smith. Bohemia and M.W. Smith each have sales of $100,000 or more of lumber products only in two states, Louisiana and Oregon and neither company is aware of any instance in which they have sold products to the same customers. The total sales of Bohemia and M.W. Smith combined account for less than 1% of all sales included under SIC Code No. 2421 - Sawmills & Planing Mills, General. You state that the only information which the SCM board sees with respect to M.W. Smith "would be a sales and a profit line in the annual budget and in long range plans."

We believe that the order in Docket No. 9035 would be applicable by its terms to this interlock. Paragraph I of the order prohibits SCM from having a common director with any corporation which competes with SCM in the production or sale of any product or service. The order does not contain any *de minimis* exception.

Nor can we say that any of the other possible grounds for exception are applicable here. The Commission has considered whether the Docket No. 9035 order is applicable to situations where the prospective interlock is between parent companies but the competition occurs between one parent and the subsidiary of the other parent. As stated above, the order prohibits SCM from having a director interlock with Kraft or with any other corporation (other than a subsidiary, parent, or sister of SCM) which competes with SCM in the production or sale of any product or service. The order thus contains a specific exemption for interlocks arising solely between SCM and its subsidiaries, and it does not provide any exemption for the activities of subsidiaries in other contexts. The Commission concludes that no such exemption was intended and that the language of the order is broad enough to encompass the prospective interlock described in your request.

The Commission has likewise considered whether it is appropriate to impute Allied's activities to SCM for the purpose of determining order coverage. In this connection, the Commission's opinion in *Borg-Warner Corporation*, Docket No. 9120 (Slip Opinion, June 3, 1983) [101 F.T.C. 863 at 919], discussed the question of when it was appropriate to impute a subsidiary's activities to a parent corporation for Section 8 purposes. The Commission stated that the relevant inquiry under Section 8

> is whether the parent company should be regarded as a "competitor" of the subsidiary's competitors, and whether an interlocked director is so placed as to be able to exercise control or even to substantially influence decisionmaking at the director level so as to dampen competitive relationships between divided corporate interests. The common law "control" inquiry is relevant insofar as it is an indication of the likelihood of collusion and anticompetitive transfer of information among competitors.

The staff invited you to supply detailed information on the control and other factors deemed relevant by the Commission in *Borg-Warner* as they relate to the relationship between SCM and M.W. Smith, but you did not do so, with the exception of stating that SCM knows "of no communication whatsoever between M.W. Smith (or Allied) and Bohemia." Accordingly, based on the limited information that you have supplied, the Commission is unable to determine that it would be inappropriate in this instance to impute Allied's activities to SCM for the purpose of determining order coverage.

In the light of the fact that the information supplied in your request is insufficient to resolve the question of whether Allied's activities should be imputed to SCM, the Commission is unable to determine whether the simultaneous service of Dr. West on the boards of SCM and Bohemia would violate Paragraph I of the order.

By direction of the Commission.

Letter of Request

February 15, 1983

Dear Mr. Feinberg:

This is a request made on behalf of respondent, SCM Corporation ("SCM"), for your determination that the simultaneous service of Dr. Richard R. West on the boards of directors of SCM and Bohemia, Inc. ("Bohemia") would not violate the Order in the above matter.

Dr. West became a member of the Board of Directors of SCM in December, 1982. He had previously been a member of the Board of Directors of Bohemia, but he resigned from that position pending resolution of the question which we are raising in this letter. If you determine that Dr. West's simultaneous service on the boards of SCM and Bohemia would not violate the Order, Dr. West intends to rejoin the Bohemia board.

Dr. West is the Dean of the Amos Tuck School of Business Administration, Dartmouth College. He is a director of The Dorsey Corporation (a manufacturer of cargo trailers and plastic containers), Liberty Communications Inc. (a cable TV and TV broadcasting company), Vornado, Inc. (a real estate holding company), and several investment companies.

Bohemia has its principal office in Eugene, Oregon and is engaged in the manufacture and sale of a variety of forest products, including lumber, plywood, veneer, particleboard and laminated beams, in marine construction and in the production of rock, gravel and aggregates. For the fiscal year ended April 30, 1982, Bohemia had total sales of $155 million; of those sales $65 million were sales of lumber.

SCM has its principal office in New York, New York and had total sales for the fiscal year ended June 30, 1982 of $1.9 billion. As you know, the company's major businesses are chemicals, coatings and resins, paper products, foods, and typewriters and appliances.

SCM owns Allied Paper, Incorporated, a Delaware corporation ("Allied"), with its principal office in Kalamazoo, Michigan. Allied's operations include a paper mill located in Jackson, Alabama. In conjunction with its paper mill, Allied owns and operates a lumber mill, also located in Jackson, Alabama; the lumber mill sells lumber products, mainly to customers in the Southeast, under the "M.W. Smith Lumber Company" trade name ("M.W. Smith"). For the fiscal year ended June 30, 1982, the total sales of Allied and its subsidiaries were $288 million, including $6.9 million total sales of all forms of lumber.

The lumber products of Bohemia and M.W. Smith are all included under SIC Code No. 2421 - Sawmills & Planing Mills, General. This product line is dominated by such industry giants as Weyerhaeuser Co. Inc., Louisiana-Pacific Corp., Georgia-Pacific Corp., St. Regis Paper Co. Inc., Boise Cascade Corp. and many others. Bohemia's market share of this category is approximately one-half of 1% and M.W. Smith's share is infinitesimal.

There are 18 states in which Bohemia and M.W. Smith both sell at least some quantity of lumber products. (*See* attached list.) The total annual sales of lumber products sold in those 18 states is $4.1 million for M.W. Smith and approximately $5.2 million for Bohemia (annualizing the six-months sales of the California mills—*see* footnote to attached list). You will note that the list shows only two states (Louisiana and Oregon) in which Bohemia and M.W. Smith each have sales of $100,000 or more of lumber products.

Of M.W. Smith's lumber sales, approximately 46% are to "office wholesalers" (non-stocking); 25% are to "yard wholesalers" (stocking); and the balance are direct sales to retailers or manufacturers. Of Bohemia's lumber sales, less than 15% are to office wholesalers; and most of Bohemia's sales are to yard wholesalers, contractors and retailers.

M.W. Smith and Bohemia have each checked with their sales personnel, and none knew of any direct competition between the two companies, that is, instances in which both companies were competing for the business of the same customer. It is, of course, possible that, unknown to the present sales personnel of the two companies, they have sold some product or products to the same customers. Even here there is not likely to be any substantial competition in view of the fact that the sales were quite small in each state and the principal channels of distribution employed by the two companies differ.

Dr. West does not serve on the board of the SCM subsidiary, Allied. Nor in his capacity as a director of SCM would he be involved with the operating policies of Allied or M.W. Smith.

Although both Bohemia and M.W. Smith market some of the same products, they market in only 18 states in common, the sales volume is minimal in each state and one markets principally to office wholesalers while only 15% of the other's sales are to such customers. Further, the sawmills and planing mills category is so large that even the combined share of Bohemia and M.W. Smith is miniscule.

In these circumstances, we do not believe that either the Act or the Order were intended to bar Dr. West's service on the boards of SCM and Bohemia.

We respectfully request that you indicate that you have no objection to service by Dr. West on the board of directors of Bohemia.

Thank you for your early consideration of this request.

Sincerely,

/s/ William E. Willis

Sales of Board ("B"), Standard
Dimension ("D"), Industrial ("I"), Saps ("S"),
Flooring ("F"), Sidings ("Si"), Prime ("P"),
Wolmanized Lumber ("W") Products by
Bohemia, Inc., (FY ended 4/30/82)*
and M.W. Smith Lumber Co. (FY ended 6/30/82)

	Bohemia		M.W. Smith	
State	$000's	Prod.	$000's	Prod.
AL	70	B,D	2,340	B,D,I, S,F,Si, P,W
FL	100	D	90	D
GA	30	B,D	170	B,D,I, F,Si
IL	50	B,F	30	B,F,W
KY	10	B	290	B,D,I, F,Si,W
LA	470	B,D	100	B,D,I, Si,W
MD	20	B	10	B,Si
MI	110	D	10	D,I
MN	190	B	10	B
MO	160	B,D	70	B,D,I
NC	70	B	100	B,D,I
NY	30	D	20	B,D,I
OH	20	D	140	B,D,I, F,W
OR	2,120	B,D	180	B,D,F
PA	20	D	5	D
TN	30	B,D	430	B,D,F, Si
TX	950	B,D,I	50	B,D,I
VA	30	D	40	D,I,S

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* Sales for Bohemia in these states are based on annual sales for Oregon mills (representing 80% of all sales) and six-months sales for California mills.

Second Letter of Request

August 26, 1983

Dear Mr. Feinberg:

In connection with our pending request on behalf of SCM Corporation ("SCM") for your determination that the service of Dr. Richard R. West on the Boards of Directors of SCM and Bohemia, Inc. is not in violation of the Order entered in the above Docket, I would like to call your particular attention to the recent decision of the Commission *In the Matter of Borg-Warner Corporation, et al.*, Docket No. 9120. [101 F.T.C. 863 (1983)]

The *Borg-Warner* decision confirms, I believe, that in view of all of the circumstances the service of Dr. West on the Boards of the two companies would neither violate the law nor the outstanding Order.

The Commission clearly articulated in *Borg-Warner:* "A parent corporation is not a competitor of another corporation merely because its subsidiary is. (citing cases)" (at p. 16), and further declared: "The relevant inquiry under Section 8 is . . . whether an interlocked director is so placed as to be able to exercise control or even to substantially influence decision making at the director level so as to dampen competitive relationships between divided corporate interests" (at p. 18).

The Board of Directors of SCM is not involved in and does not participate in the operation and policies of the M.W. Smith Lumber Company, an operating group which is a part of SCM's subsidiary, Allied Paper, Incorporated. As we have previously disclosed to you, M.W. Smith's sales are a small fraction of 1% of SCM's total sales. M.W. Smith's sales are in a sense generated as a by-product of Allied's principal business, the manufacture of pulp and paper products; thus, the M.W. Smith Lumber Company is located near Allied's Jackson, Alabama pulp and paper mill and was acquired by SCM, in 1981, mainly as an adjunct to the pulp mill because it provided a local source of wood chips, timber and timber cutting rights.

The monthly and annual financial operating reports which are presented to the SCM Board of Directors include data as to each of SCM's divisions with some breakouts for operating groups; but there are no such breakouts for the small M.W. Smith operations. The only such information which the Board sees with respect to M.W. Smith would be a sales and a profits line in the annual budget and in long range plans.

In the case of SCM and M.W. Smith we have a relationship which is even more remote than the Commission faced in *Borg-Warner* inasmuch as the SCM subsidiary, Allied, is essentially a pulp and paper producer and only this small group in Jackson, Alabama, representing about 2% of Allied's sales, is engaged in activities which could be competitive with Portland, Oregon-based Bohemia, Inc.

In fact, of course, as indicated in our prior submission, neither the Bohemia management nor the M.W. Smith management consider the other company to be a competitor, and neither management knew of any specific instances in which any of their products were sold in competition with the products of the other company.

Unlike the situation in *Borg-Warner*, we know of no communications whatsoever between M.W. Smith (or Allied) and Bohemia.

The Commission in *Borg-Warner* placed great emphasis upon the purposes of Section 8, noting that interlocking directorates were seen by Congress as "likely to facilitate collusion" (p. 25) "and anti-competitive transfer of information among competitors" (at p. 18). It is the possibility of such "collusion", the Commission declared, that renders the "control" inquiry relevant.

The absence of SCM Board involvement in the M.W. Smith activities, the fact that M.W. Smith itself is merely part of a larger subsidiary of SCM and the fact that M.W. Smith's sales are tiny in comparison both to the total sales of SCM and of its subsidiary Allied, render non-existent the risk of collusion which underlies the purpose of Section 8 of the Clayton Act and the Order which has been rendered in this proceeding. Furthermore, when one realizes that the total share of the lumber market enjoyed by Bohemia and M.W. Smith together does not reach 1%, and that in fact the companies are not even aware of any competition between them, any fear of collusion is beyond belief.

We renew our pending request that you indicate no objection to the service of Dr. West on the Board of Directors of Bohemia, Inc.

Sincerely,

/s/ William E. Willis

In fact, of course, as indicated in our prior submission, neither the Bohemia management nor the M.W. Smith management consider the other company to be a competitor, and neither management know of any specific instances in which any of their products were sold in competition with the products of the other company.

Unlike the situation in [illegible] we know of no opportunities [illegible] between M.W. Smith [illegible] and Bohemia.

The Commission, in Borg-Warner, places great emphasis upon the purposes of Section 8, noting that interlocking directorates were seen by Congress as "likely to eliminate competition" (p. 85) "and anti-competitive transfer of information among competitors" (at p. 122). It is the possibility of such "collusion", the Commission declared, that renders the "control" [illegible].

The absence of BCM Board involvement in the M.W. Smith [illegible] [illegible] by BCM and the fact that M.W. Smith's sales are, [illegible] in comparison with the total sales of BCM and of its subsidiary, Allied, render [illegible] the risk of [illegible] which [illegible] the purpose of Section 8 of the Clayton Act and the Order which has been entered in this proceeding [illegible] that the total [illegible] of the [illegible] M.W. Smith together [illegible] companies are not [illegible] of any competition between them [illegible] a [illegible].

We [illegible] that [illegible] not [illegible] election to the Board of Directors of [illegible] Inc.

[illegible]

[illegible]

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